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REPORT
No. 98-130

VETERANS' ADMINISTRATION ADJUDICATION
PROCEDURE AND JUDICIAL
REVIEW ACT

R E P O R T

OF THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 636



May 18 (legislative day, May 16) 1983.—Ordered to be printed

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VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT

MAY 18 (legislative day, MAY 16), 1983.—Ordered to be printed

Mr. SIMPSON, from the Committee on Veterans' Affairs,
submitted the following

REPORT

[To accompany S. 636]

The Committee on Veterans' Affairs, to which was referred the bill (S. 636) to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

COMMITTEE AMENDMENTS

The amendments are indicated in the bill (introduced version) as reported and are as follows:

On page 5, line 3, strike out "(c)" and insert in lieu thereof "(d)".

On page 5, line 2, strike out "subsection" and insert in lieu thereof "subsections" and after such line insert the following new subsection:

(c)(1) When there are 65 members of the Board, the Chairman may from time to time appoint from the professional staff of the

Board, or reappoint one time within the three-year period following the expiration of the term of the initial appointment, individuals to serve as temporary members of the Board for terms not to exceed one year. Not more than one such member may be appointed to a section of the Board.

(2) If, as a result of the temporary absence of a member, a section is composed of less than three members, the Chairman may assign an individual from the professional staff of the Board to serve as an acting member of the Board on such section for not to exceed 30 days. An individual so appointed may serve a total of 60 days as an acting member during any fiscal year. Not more than one such member may be assigned to a section of the Board.

"(3) In each annual report to the Congress required by section 214 of this title, the Administrator shall provide detailed descriptions of the activities undertaken and plans made in the fiscal year for which such report is made with respect to the authority provided by paragraph (1) of this subsection. In each such annual report, the Administrator shall indicate, in terms of full-time employee equivalents, the number of Board members appointed pursuant to paragraph (2) of this subsection."

On page 5, line 5, strike out "October 1, 1983" and insert in lieu thereof "December 31, 1984".

On page 6, beginning with line 11, strike out all down through line 15 and insert in lieu thereof the following:

(2) in subsection (b)—

(A) by striking out "When" and inserting in lieu thereof

"(1) Except as provided in paragraph (2), when";

(B) by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned"; and

(C) by adding at the end thereof the following new paragraph:

"(2) When, without the vote of a member appointed under section 4001(c) (1) or (2) of this title a section would be evenly divided, such member shall not vote."

On page 8, line 5, strike out "fact, law, and" and insert in lieu thereof "fact and law and on."

On page 10, beginning on line 4, strike out all beginning with "at" through "proceeding,".

On page 16, after line 20, insert the following new section.

SEC. 111. Section 3010(i) is amended—

(1) by inserting "(1)" after "(i)"; and

(2) by adding at the end the following new paragraph:

"(2) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the proper service department, the effective date of commencement of the benefits so awarded shall be the date on which an award of benefits under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed."

On page 17, line 4, insert after "Administrator" a comma and the following: "other than rules or regulations pertaining to agency management or personnel or to public property or contracts,".

On page 19, line 8, strike out "The Administrator shall file, together with" and insert in lieu thereof "Not later than 30 days after filing".

On page 19, line 10, insert after "section," the following: "the Administrator shall file".

On page 19, strike out line 25 and on page 20, beginning with line 1, strike out all down through line 6 and insert in lieu thereof the following:

"(f)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than 180 days after notice of the first final decision of the Administrator rendered after the last day of such fiscal year is mailed to the claimant pursuant to section 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within 180 days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Administrator.

"(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title."

On page 25, line 7, strike out the comma, and strike out "recognized under this section,".

On page 25, line 21, and on page 27, line 1, strike out "percentum" and insert in lieu thereof "percent".

On page 28, line 10, strike out the material beginning with "where" down through "just" in line 13, and insert in lieu thereof "in accordance with the provisions of section 2412(d) of title 28, notwithstanding the provisions of section 204(c) of the Equal Access to Justice Act, Public Law 96-481."

Thus, the text of the bill (strike out the material in brackets and insert the material in italics) as reported is as follows:

That (a) this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADJUDICATION PROCEDURES

SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I the following new section:

"§ 3007. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.

"(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section."

(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended by striking out in the item relating to chapter 51 "Applications" and inserting in lieu thereof "Claims".

(2) The heading of such chapter is amended to read as follows:

**"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND
PAYMENTS"**

(c)(1) The table of sections at the beginning of such chapter is amended by striking out in the item relating to subchapter I "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

(2) The heading of subchapter I of such chapter is amended to read as follows:

"Subchapter I—Claims"

(d) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new item:

"3007. Burden of proof; benefit of the doubt."

SEC. 102. Section 3311 is amended by adding at the end the following new sentences: "Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing by registered or certified mail addressed to such individual at such individual's last known dwelling place or principal place of business. A verified return by the individual so serving the subpoena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service."

SEC. 103. Section 4001 is amended—

(1) by amending the second sentence of subsection (a)—

(A) by striking out "(not more than fifty)" and inserting in lieu thereof "(not more than sixty-five)";

(B) by striking out "associate"; and

(C) by inserting before the period at the end of such sentence "in a timely manner"; and

(2) by adding at the end the following new [subsection] subsections:

"(c)(1) When there are 65 members of the Board, the Chairman may from time to time appoint from the professional staff of the

Board, or reappoint one time within the three-year period following the expiration of the term of the initial appointment, individuals to serve as temporary members of the Board for terms not to exceed one year. Not more than one such member may be appointed to a section of the Board.

"(2) If, as a result of the temporary absence of a member, a section is composed of less than three members, the Chairman may assign an individual from the professional staff of the Board to serve as an acting member of the Board on such section for not to exceed 30 days. An individual so appointed may serve a total of 60 days as an acting member during any fiscal year. Not more than one such member may be assigned to a section of the Board.

"(3) In each annual report to the Congress required by section 214 of this title, the Administrator shall provide detailed descriptions of the activities undertaken and plans made in the fiscal year for which such report is made with respect to the authority provided by paragraph (1) of this subsection. In each such annual report, the Administrator shall indicate, in terms of full-time employee equivalents, the number of Board members appointed pursuant to paragraph (2) of this subsection."

"[c](d) The Chairman of the Board shall submit a report to the appropriate committees of the Congress, not later than [October 1, 1983] December 31, 1984, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the twenty-four months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members of, and the professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section."

SEC. 104. Section 4002 is amended by striking out "associate" wherever it appears.

SEC. 105. Section 4003 is amended—

(1) in subsection (a), by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned"; and

[(2) in subsection (b), by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned".]

(2) in subsection (b)—

(A) by striking out "When" and inserting in lieu thereof "(1) Except as provided in paragraph (2), when";

(B) by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned"; and

(C) by adding at the end thereof the following new paragraph:

"(2) When, without the vote of a member appointed under section 4001(c)(1) or (2) of this title a section would be evenly divided, such member shall not vote."

SEC. 106. Section 4004 is amended—

(1) in subsection (a)—

(A) by striking out "involving" in the first sentence and inserting in lieu thereof "for"; and

(B) by inserting before the period at the end of the second sentence "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law";

(2) by striking out subsection (b) and inserting in lieu thereof the following:

"(b)(1) Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.

"(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—

"(A) when new and material evidence is secured, shall, and

"(B) for good cause shown, may

authorize the reopening of a claim and review of the Board's former decision.

"(3) A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authority set forth in paragraph (2) of this subsection to authorize the reopening of a claim and a review of the former decision."; and

(3) by amending subsection (d) to read as follows:

"(d) After reaching a decision in a case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of [fact, law, and] fact and law and on matters of discretion presented on the record; and

"(2) an order granting appropriate relief or denying relief."

SEC. 107. Section 4005(d)(5) is amended by striking out "will base its decision on the entire record and".

SEC. 108. Section 4009 is amended by adding after subsection (b) the following new subsection:

"(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, the provisions of subchapter II of chapter 71 of this title to the contrary notwithstanding."

SEC. 109. (a) Chapter 71 is further amended by adding at the end the following new sections:

"§ 4010. Adjudication procedures

"(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

"(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations which the Administrator shall prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

"(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

"(A) [at a reasonable time prior thereto as well as during such proceeding,] to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

"(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations which the Administrator shall prescribe, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

"(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

"(D) to submit rebuttal evidence;

"(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

"(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

"(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

"(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this subsection fails to answer or fails to provide responsive answers to any such interrogatories within thirty days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpoena under section 3311 of this title (with enforcement of such subpoena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within one hundred miles of where such person resides, is employed, or transacts business.

"(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

"(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall

prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

"§4011. Notice of procedural rights

"In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim."

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 4009 the following new items:

"4010. Adjudication procedures.

"4011. Notice of procedural rights."

SEC. 110. (a) In order to evaluate the feasibility and desirability of alternative methods of (1) assuring the resolution of claims before the Administrator of Veterans' Affairs for benefits under laws administered by the Veterans' Administration as promptly and efficiently as feasible following the filing of a notice of disagreement pursuant to section 4005 (as amended by section 107 of this Act) or 4005A of title 38, United States Code, and (2) affording claimants the opportunity for a hearing before or review by a disinterested authority at a location as convenient and on as timely basis as possible for each claimant, the Administrator is authorized to conduct a study, commencing not more than one year after the date of the enactment of this Act, for a period of twenty-four months, involving either or both of the alternative methods described in subsection (b) of this section for resolution of claims.

(b)(1) In not more than three geographic areas, the Administrator is authorized to provide an intermediate-level adjudication process whereby each claimant may, within the time afforded such claimant under paragraph (3) of section 4005(d) or 4005A(b) of title 38, United States Code, to file an appeal, request a de novo hearing at the agency of original jurisdiction (as described in section 4005(b)(1) of such title) before a panel of three Veterans' Administration employees, each of whose primary responsibilities include adjudicative functions but none of whom shall have previously considered the merits of the claim at issue. Following such hearing, such panel shall render a decision and prepare a new statement of the case in accordance with the requirements of paragraphs (1) and (2) of such section 4005(d) of such title. Such new statement of the case shall, for all purposes relating to appeals under chapter 71 of such title, be considered to be a statement of the case as required by paragraph (1) of such section 4005(d).

(2) In not more than three other geographic areas, the Administrator is authorized to provide for an enhanced schedule of visits, on at least a quarterly basis each year, by a panel or panels of the Board of Veterans' Appeals to conduct formal recorded hearings pursuant to section 4002 of such title in such areas.

(c) Not later than six months after the completion of such study, the Administrator shall report to the Congress on the results thereof, including an evaluation of the cost factors associated with each alternative studied and with any appropriate further implementation thereof, the impact on the workload of each regional office involved in such study, and the impact on the annual caseload of the Board of Veterans' Appeals resulting from each alternative studied, together with any recommendations for administrative or legislative action, or both, as may be indicated by such results.

SEC. 111. Section 3010(i) is amended—

(1) by inserting "(1) after "(i)"; and

(2) by adding at the end the following new paragraph:

"(2) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the proper service department, the effective date of commencement of the benefits so awarded shall be the date on which an award of benefits under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed."

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end the following new section:

"§ 222. Rule making

"Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator, *other than rules or regulations pertaining to agency management or personnel or to public property or contracts*, shall be subject to the requirements of section 553 of title 5."

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 221 the following new item:

"222. Rule making."

TITLE III—JUDICIAL REVIEW

SEC. 301. Section 211(a) is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784 and subchapter II of chapter 71 of this title".

SEC. 302. (a) Chapter 71 is further amended—

(1) by inserting after the table of sections the following new heading:

"SUBCHAPTER I—GENERAL";

and

(2) by adding at the end thereof the following new subchapter:

"SUBCHAPTER II—JUDICIAL REVIEW

"§ 4025. Right of review; commencement of action

"(a) For the purposes of this chapter—

"(1) 'final decision of the Administrator' means—

"(A) a final determination of the Board of Veterans' Appeals pursuant to section 4004 (a) or (b) of this title; or

"(B) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title; and

"(2) 'claim for benefits' means—

"(A) an initial claim filed under section 3001 of this title;

"(B) a challenge to a decision of the Administrator reducing, suspending or terminating benefits; or

"(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph.

"(b) Except as provided in subsection (f) of this section, after any final decision of the Administrator adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after notice of such decision is mailed to such claimant pursuant to section 4004(d) of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

"(c) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

"(d) [The Administrator shall file, together with] *Not later than 30 days after filing the answer to a complaint filed pursuant to subsection (a) of this section, the Administrator shall file a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court considers relevant to its consideration of the case.*

"(e) In an action brought pursuant to subsection (b) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (d) of this section, to enter judgment in accordance with section 4026 of this title or remand the case in accordance with such section or section 4027 of this title.

["(f) No action may be brought under this section—

["(1) where the initial claim for benefits is filed pursuant to section 3001 of this title after the last day of the fifth fiscal year beginning after the effective date of this section; or

["(2) with respect to matters arising under chapters 19 and 37 of this title.]

"(f)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than 180 days after notice of the first final decision of the Administrator rendered after the last day of such fiscal year is mailed to the claimant pursuant to section 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within 180 days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Administrator.

"(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title."

"§ 4026. Scope of review

"(a)(1) In any action brought under section 4025 of this title, the court, to the extent necessary to its decision and when presented, shall—

"(A) decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

"(B) compel action of the Administrator unlawfully withheld;

"(C) hold unlawful and set aside decisions, findings (other than those described in clause (D) of this paragraph), and conclusions of the Administrator found to be—

"(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(ii) contrary to constitutional right, power, privilege, or immunity;

"(iii) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(iv) without observance of procedure required by law; and

"(D) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside.

"(2) Before setting aside any finding of fact under paragraph (1)(D) of this subsection, the court shall specify the deficiencies in the record upon which the court would set aside such finding and shall remand the case one time to the Administrator for further action not inconsistent with the order of the court in remanding the case. In remanding a case under the first sentence of this paragraph, the court shall specify a reasonable period of time within which the Administrator shall complete the ordered action. If the Administrator does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

"(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(d) of this title shall be subject to review, and the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the court.

"(d) When a final decision of the Administrator is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4027. Remands

"(a)(1) In any action brought under section 4025 of this title, the court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (b) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such a review is not completed within ninety days after the date of such remand, the matter shall be returned to the court for its action.

"(2)(A) At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator.

"(B) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator.

"(C) In the case of a remand under subparagraph (A) or (B) of this paragraph, the court may specify a reasonable period of time within which the Administrator shall complete the required action.

"(b) After a case is remanded to the Administrator under subsection (a) of this section, and after further action by the Administra-

tor, including consideration of any additional evidence, the Administrator shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based. Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title.

"§ 4028. Survival of actions

"Any action brought under section 4025 of this title shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

"§ 4029. Appellate review

"The decision of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions."

(b) The table of sections at the beginning of such chapter is amended—

(1) by inserting before the item relating to section 4001 the following new item:

"SUBCHAPTER I—GENERAL";

and

(2) by adding after the item (added by section 109(b) of this Act) relating to section 4011 the following new items:

"SUBCHAPTER II—JUDICIAL REVIEW

"Sec.

"4025. Right of review; commencement of action.

"4026. Scope of review.

"4027. Remands.

"4028. Survival of actions.

"4029. Appellate review."

SEC. 303. Section 1346(d) of title 28, United States Code, is amended by inserting before the period at the end thereof "except as provided in subchapter II of chapter 71 of title 38".

TITLE IV—ATTORNEYS' FEES

SEC. 401. Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c) The Administrator shall approve reasonable attorneys' fees to be paid by the claimant [.] to attorneys [recognized under this section,] for representation before the Veterans' Administration in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

"(1) for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered, \$10; or

"(2) for any claim resolved after such time, an amount in excess of—

"(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attor-

ney unless the claim is resolved in a manner favorable to the claimant, 25 [per centum] percent of the total amount of any past-due benefits awarded on the basis of the claim; or

"(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

"(i) the fee agreed upon by the claimant and the attorney; or

"(ii) \$500, or such greater amount as may be specified from time to time in regulations which the Administrator shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of \$500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

"(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 [per centum] percent of the total amount of any past-due benefits awarded on the basis of the claim.

"(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of \$750 to be paid to the attorney by the claimant for the representation of such claimant.

"(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision of the Administrator or court making such award.

"(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

"(g) For the purposes of this section—

"(1) the terms 'final decision of the Administrator' and 'claim for benefits' shall have the same meaning provided for such terms, respectively, in section 4025(a) of this title; and

"(2) claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs [where the court finds that the position of the Administrator was not substantially justified or that special circumstances make an award just] *in accordance with the provisions of section 2412(d) of title 28, notwithstanding the provisions of section 204(c) of the Equal Access to Justice Act, Public Law 96-481.*"

SEC. 402. Section 3405 is amended—

- (1) by striking out "or" after "title,"; and
- (2) by striking out "him" and inserting in lieu thereof "such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title".

TITLE V—EFFECTIVE DATES

SEC. 501. This Act and the amendments made by this Act shall take effect on the first day of the first month beginning not less than one hundred and eighty days after the date of enactment of this Act.

SEC. 502. A civil action authorized in subchapter II of chapter 71 of title 38, United States Code (as added by section 302(a) of this Act) may be instituted to review decisions of the Board of the Veterans' Appeals rendered on or after April 1, 1983.

INTRODUCTION

S. 636, the proposed "Veterans' Administration Adjudication and Procedure and Judicial Review Act", was introduced on March 1, 1983, by Senator Gary Hart of Colorado, Senator Alan Cranston, Ranking Minority Member of the Committee, Senator Alan K. Simpson, Chairman of the Committee, and 24 original cosponsors.

The introduction of S. 636 was one in a series of steps dating back to 1975, including the introduction of S. 3392 in the 94th Congress, the introduction of S. 364 in the 95th Congress and 5 days of hearings thereon, the development of a Committee substitute in December 1978, and the introduction of S. 330 in the 96th Congress. S. 330 was favorably reported by the Committee on May 3, 1979, by a vote of 9-1, and was passed by the Senate by voice vote on September 17, 1979.

Again, in the 97th Congress, the Committee and the Senate acted on such legislation. S. 349 as introduced in the 97th Congress was identical to the Senate-passed version of S. 330. It was unanimously reported by the Committee, with an amendment in the nature of a substitute, on April 28, 1982, and was passed by the Senate by voice vote on September 14, 1982.

S. 636 as introduced was identical to the Senate-passed version of S. 349, with two exceptions: first, the deletion of title V, providing for a merit pay system exclusion for members of the Board of Veterans' Appeals—a matter which had been resolved administratively since the previous Committee action; and second, a one-year delay in the effective date. The Committee held a hearing to con-

sider S. 636 on March 23, 1983. Testimony was received from John Murphy, General Counsel of the VA; Frederick Davis, Dean of the University of Dayton School of Law, testifying on behalf of the American Bar Association; Senator Hart; Robert E. Lyngh, Director of the National Veterans' Affairs and Rehabilitation Commission of the American Legion; James N. Magill, Special Assistant, National Legislative Service of the Veterans of Foreign Wars of the United States; John F. Heilman, National Legislative Director of the Disabled American Veterans; R. Jack Powell, Executive Director of the Paralyzed Veterans of America; Stanley N. Zwaik, National Commander of the Jewish War Veterans of the United States of America; Leland E. Beck, Counsel to the Administrative Office of the United States Courts; and Richard K. Berg, General Counsel of the Administrative Conference of the United States.

The Committee met in open session on April 12, 1983, to consider S. 636 and other matters, and voted to report favorably S. 636 with certain minor Committee amendments developed after reviewing the testimony and considering various technical recommendations from VA staff.

SUMMARY OF S. 636 AS REPORTED

SUMMARY OF PROVISIONS

The Committee bill has five titles: Adjudication procedures; Veterans' Administration rule making; Judicial review; Attorneys' fees; and Effective dates, as follows:

Title I: *Adjudication procedures*.—This title would codify and establish various internal procedures of the VA applicable in adjudications of claims for benefits under laws administered by the VA. Included in title I of the Committee bill are provisions that would:

1. Codify the burden of proof and reasonable doubt standards in VA claims adjudication proceedings, currently provided for by regulation (38 CFR 3.102 and 3.103), in order to assure that the VA's present practices of providing claimants all reasonable assistance in the development of claims and construing the evidence liberally in favor of the claimant are not lost in reaction to the provision, in title III of the Committee bill, authorizing judicial review of final decisions denying claims.

2. Specify procedures for the service of subpoenas authorized under section 3311 of title 38, United States Code, including procedures for personal service or service by mail.

3. Increase the statutory limitation on the size of the BVA from 50 to 65 in order both to ease existing strains on the BVA's docket and to enhance the Board's ability to deal with workload increases that may be generated by judicial review of VA decisions.

4. Encourage the BVA to dispose of appeals before it in a timely manner.

5. Authorize the appointment of temporary BVA members for a term of not more than 1 year each when all 65 BVA positions are filled, and of acting members, for a period of not more than 30 days, or 60 days total in any single fiscal year, to serve in the temporary absence of regular members.

6. Preclude a temporary or acting member from casting a vote in any case where the votes of the two regular members are split.

7. Require the Administrator to report annually to Congress on the implementation of the provisions authorizing the appointment of temporary and acting BVA members.

8. Require the Chairman to report to the appropriate committees of the Congress annually on the Board's current and future workload and its ability, based on then current and projected staffing, to dispose of appeals in a timely manner.

9. Require the BVA to provide a claimant with notice and an opportunity for a hearing before making a decision based on additional official information received after the BVA had previously decided the case.

10. Codify a claimant's right to an opportunity for a hearing before the BVA.

11. Require expressly that BVA decisions must be based exclusively on evidence and material of record and on applicable provisions of law.

Make a technical correction in the description of the BVA's authority to reopen a claim by deleting (as inconsistent with present practice) the present requirement that new and material evidence sufficient to reopen a claim be in the form of official reports from the proper service department.

13. Specify that a court decision upholding denial of a claim under title III of the Committee bill, shall not diminish the Board's discretionary authority to reopen a claim.

14. Require the BVA to mail a detailed statement of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and such representative.

15. Expand the present requirement that BVA decisions be in writing and contain findings of fact and conclusions of law separately stated, to require that such decisions include findings and conclusions and reasons and bases therefor, on all material issues of fact, law, and matters of discretion, as well as an order granting or denying relief.

16. Expressly provide a claimant before the BVA with the right, upon request, to have the Board acquire an independent medical opinion when there is a substantial disagreement between the substantiated findings or opinions of two physicians on an issue material to the outcome of the case. Any Board decision to deny such a request, and the basis for such denial, would have to be provided to the claimant but such decision would not be subject to judicial review.

17. Authorize the Administrator to administer oaths and affirmations, examine witnesses and receive evidence in VA claims adjudication proceedings.

18. Provide for the admission, even if inadmissible under the rules of evidence applicable in court, of all evidence submitted in VA claims adjudication proceedings subject only to such provisions as the Administrator may impose through regulations for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

19. Provide that, in the course of hearings on a claim for VA benefits following initial denial of the claim, the claimant (or other party) shall have the right to review and, on the payment of a fee (waivable, pursuant to regulations that the Administrator must prescribe, on the basis of inability to pay or for other good cause shown) limited to the costs of duplication, to obtain copies of the case files and all materials to be used by the VA at the hearing, to present witnesses and evidence including medical opinions and rebuttal evidence, to make argument and to submit written contentions, and to submit to any person written interrogatories which must be answered unless written objections thereto are filed. If the person served with interrogatories files an objection thereto, the Administrator must, pursuant to regulations that the Administrator must prescribe, evaluate the objection and issue an order directing that answers be given or stating that they need not be given. If the person served with interrogatories fails to comply with such an order or, in the absence of an objection, to answer the interrogatories, the party who served the interrogatories would have the right, upon a statement or showing of good cause, to have the Administrator issue a subpoena (enforceable in Federal district court) for the witness' attendance at a deposition at which the unanswered interrogatories would be asked.

20. Allow, in the course of any claims proceeding, any VA employee to disqualify himself or herself on the basis of personal bias or other cause and a party to challenge such an employee on such basis.

21. Specify the materials that must be included in the record of VA claims adjudication proceedings and provide that the record shall be available for the claimant's inspection and shall be copied for the claimant upon the payment of a fee (waivable, pursuant to regulations that the Administrator must prescribe, on the basis of claimant's inability to pay or for other good cause shown) limited to the costs of duplication.

22. Specify that the adjudication rights contained in title 38 and prescribed thereunder by the Administrator are exclusive.

23. Require the Administrator, at each stage of claims adjudication proceedings before the VA, to provide the claimant with detailed notice, in easily understandable language, of the claimant's procedural rights.

24. Authorize a VA study of alternative methods of ensuring the prompt and efficient resolution of claims and affording claimants the opportunity for a timely and convenient hearing or review by a disinterested authority. Under this provision, the Administrator could study the following two alternative methods of speeding claims resolution at locations convenient to claimants: (A) intermediate review panels which would conduct *de novo* reviews at VA regional offices prior to appeal to the BVA, and (B) an enhanced schedule of BVA traveling board visits (at least four per year). The report on the study, including the Administrator's recommendations for administrative or legislative actions, or both, would be due to be submitted to the Congress within 6 months after completion of the study.

25. Permit retroactive awards for claims reopened and allowed on the basis of new and material evidence in the form of service records.

Title II: *Veterans' Administration rule making.*—This title would require application of the rule making provisions of the Administrative Procedure Act (APA) to all matters other than those involving agency management, personnel, public property or contracts. Matters such as those involving VA benefits and loans would thus be made subject to certain APA requirements, including requirements of notice to the public of proposed regulations and opportunity for comment on such proposed regulations, notwithstanding the exclusion from such provisions in section 553(a)(2) of title 5, United States Code, of matters involving loans, grants, benefits, or contracts.

Title III: *Judicial review.*—This title would permit access to the United States Federal court system for review of decisions of the Administrator on claims for benefits. Included in title III of the Committee bill are provisions that would:

1. Expand the present category of exceptions to the general preclusion of judicial review contained in present section 211(a) of title 38, United States Code.

2. Authorize review of a final decision of the Administrator adverse to a VA benefits claimant in Federal district court (in either the plaintiff's home district or the judicial district where the Board of Veterans' Appeals is located, presently the District of Columbia) instituted by a civil action brought within 180 days of the mailing by the VA of notice of such decision.

3. Define a "final decision of the Administrator", which may be appealed to Federal court, to include a Board of Veterans' Appeals (BVA) final decision on the merits, refusal to reopen a claim, and dismissal of an appeal.

4. Define "claim for benefits" to include not just initial claims, but also subsequent action taken on a claim such as reduction or termination of benefits.

5. Require that a complaint instituting a civil action for court review of a decision relating to a claim for benefits include sufficient information to permit the VA to identify and locate the plaintiff's VA records.

6. Require the VA to file, together with its answer to a complaint, a certified copy of all of the materials that constitute the record or, if the cost of filing all such materials would be unduly expensive, a complete index of all of the materials. In the latter case, the court would, after considering the requests of the parties, order the Administrator to file certified copies of such indexed items as it deemed relevant to its consideration of the case.

7. Authorize a court, in an action for review of a VA denial of a claim for benefits, to enter a judgment on the pleadings and the records.

8. Preclude judicial review, under the provisions added by this title of the Committee bill, unless the initial claim is filed with the Administrator on or before the last day of the fifth fiscal year beginning after the effective date of such provisions and the appeal to Federal district court is filed within 180 days

of the first BVA decision adverse to the claimant, as well as with respect to matters arising under chapters 19 (insurance) and 37 (home, condominium, and mobile home loans) of title 38, United States Code.

9. Authorize the reviewing court to decide all relevant questions of law; to interpret constitutional, and statutory provisions as well as other actions of the Administrator, compel action of the Administrator unlawfully withheld; and to hold unlawful and set aside decisions, findings, and conclusions of the Administrator found to be (A) arbitrary, capricious, an abuse of discretion, or not in accordance with law, (B) contrary to constitutional right, power, privilege, or immunity, (C) in excess of statutory jurisdiction, authority, or limitation, or in violation of a statutory right, or (D) without observance of procedure required by law, or (E) in the case of a finding of material fact, so utterly lacking in a rational evidentiary basis that a manifest and grievous injustice would result if the finding were not set aside.

10. Require a reviewing court, before reversing an Administrator's decision on the basis of the court's finding that a factual determination of the Administrator is utterly lacking in a rational evidentiary basis, to specify where it finds the record deficient and remand the matter a single time to the Administrator for further action within a reasonable, specified period of time.

11. Require a court, in making determinations, to review those parts of the administrative record cited by a party and to take due account of the rule of prejudicial error.

12. Preclude a reviewing court from conducting a trial *de novo* on the Administrator's findings of fact.

13. Provide that, in a matter resolved by the VA solely on the basis of a party's failure to comply with a VA regulation, the reviewing court may consider only issues raised as to the validity of or a party's compliance with the regulation.

14. Authorize three different types of remands from the reviewing court to the Administrator: First, a single remand for not more than 90 days, at the Administrator's request before the Administrator files an answer, for the Administrator to reconsider the case; second, a remand in the court's discretion after the Administrator has filed an answer; and third, a remand if either party applies for leave to adduce further evidence and the moving party shows "good cause" for the requested remand.

15. Provide that any actions brought under the judicial review provisions added by this title of the Committee bill will survive the tenure of any individual as Administrator.

16. Provide that decisions of the district court pursuant to the judicial review provisions added by this title shall be subject to review in higher Federal courts in the same manner as judgments in other civil actions.

17. Specify that the current-law limitation on the jurisdiction of Federal district courts in matters involving pensions shall not apply to VA pension matters.

Title IV: Attorneys' fees.—This title would revise the present title 38 limitation of \$10 for claimants' attorneys' fees by authorizing reasonable attorneys' fees, within certain limits, for representation of individuals before the VA and for representation in a case appealed to court under the judicial review provisions added to title 38 by this title of the Committee bill, with a specified limitation in cases in which the matter is resolved in a manner unfavorable to the claimant. Included in title IV are provisions that would:

1. Retain the \$10 limitation on the amount an attorney may receive for services rendered prior to a final BVA decision, while removing an ambiguity with respect to whether that limitation applies under current law to attorneys "recognized" for practice before the VA.

2. Permit the Administrator to approve a reasonable attorneys' fee for representation within the VA after a final BVA decision (where, for example, a case remains before the VA for reconsideration or for reopening on the basis of "new and material evidence" offered under section 4004(b) of title 38, United States Code, as amended by title I of the Committee bill), up to a maximum of \$500 or, if the claimant and attorney have entered into a contingency-fee agreement, no more than 25 percent of any past-due benefits awarded the claimant.

3. Authorize the Administrator to increase the \$500 maximum limitation in future years to reflect changed economic conditions.

4. Authorize the Administrator to disregard the \$500 limitation in an individual case involving extraordinary circumstances warranting a higher fee.

5. Allow a reviewing court, in a case appealed from the VA, to approve a reasonable attorneys' fee. For cases not resolved in a manner favorable to a claimant, the maximum a court could approve would be \$750. For cases resolved in a manner favorable to a claimant, the only limitation on the amount of the fee that a court could approve would be that it must be reasonable, or that,

if a claimant and an attorney had entered into a contingent-fee agreement, the fee approved by the court could not exceed 25 percent of the total amount of past-due benefits.

6. Authorize the VA to make payment to an attorney from past-due benefits, but preclude the VA from making payments from benefits received subsequent to the date of the decision entitling the veteran to benefits.

7. Limit the applicability of the attorneys' fee provisions to cases involving claims for benefits.

8. Define, for the purpose of attorneys' fees provisions, a claim as being "resolved in a manner favorable to the claimant" when any or all of the relief sought is granted.

9. Authorize a court to award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of the Equal access to Justice Act, under which such an award may be made unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

10. Provide criminal penalties for willfully and intentionally defrauding a VA claimant.

Title V: *Effective dates*.—This title provides for an effective date and authorizes the institution of civil actions, under the judicial review provisions added by title III of the Committee bill, for the review of certain Board of Veterans' Appeals (BVA) decisions prior to such effective date. Included in this title are provisions that would:

1. Provide that the provisions added by the Committee bill would become effective 180 days after the date of enactment.

2. Allow for court review of a BVA decision rendered on or after April 1, 1983.

DISCUSSION

Inasmuch as S. 636 as reported is substantially indetical in all major substantive respects to S. 349 as reported in the 97th Congress, the sections of Basic Purpose and Discussion of the Committee Report on S. 349 (S. Rept. No. 97-466, 97th Cong., 2d Sess.), is incorporated by specific reference as if fully set forth herein, to the extent not inconsistent with materials set forth in this report. The committee amendments to S. 636 do, however, add two new items to the legislation which are appropriate for discussion at this point.

SHORT-TERM BVA MEMBERS

The first new item relates to temporary and acting members of the Board of Veterans' Appeals. the Committee bill includes a new provision derived from S. 887, legislation introduced by Chairman Simpson at the request of the Administration, that would provide the Chairman of the Board of Veterans' Appeals (BVA) with new authority relating to the membership of the Board. Pursuant to this authority, the BVA Chairman would be able to appoint individuals from the Board's professional staff (either attorney-advisers or physician-advisers) to serve as either "temporary" members—serving as members of the Board sections during periods when the Board has a full statutory complement of members—or as "acting" members—at any time when a duly-appointed Board Member is temporarily absent from the three-member section to which he or she is regularly assigned.

S. 887 as introduced would have made three changes in existing law—authorizing the expansion of the Board from 50 to 65 members, allowing the Chairman to designate individuals to act as members of the Board, and eliminating references to "associate" members of the Board. Because S. 636 as introduced already included provisions increasing the size of the Board to 65 members (in section 103) and eliminating the references to the term "associate" members (in sections 103 and 104), the only issue from S. 887 remaining to be addressed in the context of S. 636 related to the Chairman's authority to designate individuals not appointed under present section 4001 of title 38, to serve temporarily as BVA members.

The provisions in the Committee bill, in section 103, would authorize the Chairman to make two types of time-limited appointments to the Board. Under the first such authority, when there are

65 members on the Board (which would be the full complement of Board members under provisions in the Committee Bill), the Chairman would be authorized to appoint individuals from the Board's professional staff to serve temporarily as additional members of the Board. Such appointments would be for terms not in excess of 1-year—with a possible 1-year reappointment in the 3-year period following the initial appointment—and no more than one "temporary" member could serve on a section (composed of three members) of the Board.

The Committee anticipates that this authority would be used in situations such as exist at the present time when there is a significant backlog of cases awaiting Board action and the Chairman wishes to expand the number of three-member Board sections beyond the number permitted by the statutory limit of 65 members, to help reduce the backlog. In such a situation, and to the extent the backlog was not the result of an unusual, short-term phenomenon but instead represented increased applications for Board action, the Committee expects that the Chairman and the Administrator would also be seeking an expansion of the statutory limit on the size of the Board—as they are at present—so that there would not have to be on-going reliance on temporary Board members.

Under the second appointment authority in the Committee bill, the Chairman would be authorized to fill a short-term vacancy—resulting from a cause such as illness, travel, or vacation—in a section of the Board. The appointment of an individual as an "acting" member under this authority would be limited to a period of 30 days, and no individual could serve pursuant to such an appointment for a total period in excess of 60 days in any fiscal year. As with temporary members, no more than one acting member could be assigned to a section of the Board.

Because the Committee does not believe that these new authorities should be allowed to alter the fundamental nature of the Board as an independent entity made up of individuals appointed with the approval of the President, the role of "temporary" or "acting" members would be limited in one significant respect. In any case in which the decision of a section of the Board is not unanimous and the vote of a "temporary" or "acting" member would otherwise form the basis for a "majority of members" of a section—that is, where the two permanent members are in disagreement—with which the Chairman, under section 4003(b) of title 38, could concur and thus dispose of the case, the temporary or acting member would not be permitted to vote. In such a situation, there would then be an evenly divided section (due to the disagreement of the two permanent members) and the Chairman would expand the section, by adding another three-member section. However, where the acting member is in disagreement with the two permanent members, this would still produce a nonunanimous decision requiring further action by the Chairman under section 4003(b).

As a reflection of the Committee's strong intention that these authorities be used only as needed and not result in any deviation from the normal process for appointing members of the Board with the approval of the President, the Committee bill would require the

Administrator, as part of the Administrator's annual report to Congress which is required by section 214 of title 38, to provide detailed information on the use of both authorities. This would enable the Committee to monitor closely the use of these new authorities and to take corrective action as necessary.

RETROACTIVE BVA AWARDS

The second new item would permit the BVA to make retroactive awards for claims reopened and allowed on the basis of new and material evidence, when such evidence takes the form of official reports from the proper service department. This amendment to section 3011 of title 38 is intended to preserve existing VA practice where there is new and material evidence involving such service records, in light of technical advice from VA staff indicating that the policy of retroactivity which is presently applied in such cases would otherwise be negated by the provisions in section 106 of the bill as introduced relating to reopening and reconsideration for new and material evidence. It is the Committee's intention that no effective date of any award of benefits shall be rendered less favorable to any claimant under the Committee bill than it would be under existing law and practice.

COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by the Congressional Budget Office, estimates that the costs resulting from the enactment of the Committee bill during the first 5 years following enactment would be \$2.9 million in fiscal year 1984; \$8.3 million in fiscal year 1985; \$10.3 million in fiscal year 1986; \$11.5 million in fiscal year 1987; and \$12.2 million in fiscal year 1988. A detailed breakdown of the costs, as estimated by CBO, over the 5-year period follows:

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

May 10, 1983

1. BILL NUMBER: S. 636

2. BILL TITLE:

Veterans Administration Adjudication Procedure and Judicial Review Act.

3. BILL STATUS:

As ordered reported by the Senate Committee on Veterans' Affairs, April 20, 1983.

4. BILL PURPOSE:

To establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans Administration (VA); to apply the provisions of section 553 of title 5, U.S.C., to rulemaking procedures of the VA; to provide for judicial review of certain final decisions of the Administrator of Veterans Affairs; and for other purposes.

5. ESTIMATED COST TO THE FEDERAL GOVERNMENT:

(by fiscal year, in millions of dollars)

	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>
<u>Function 700 Impact</u>					
<u>Estimated</u>					
Authorization Level	2.4	6.5	7.6	8.1	8.5
Estimated Outlays	2.2	6.1	7.6	8.0	8.5
<u>Function 750 Impact</u>					
<u>Estimated</u>					
Authorization Level	0.8	2.3	2.7	3.5	3.7
Estimated Outlays	0.7	2.2	2.7	3.5	3.7
<u>Net Budgetary Impact</u>					
<u>Estimated</u>					
Authorization Level	3.2	8.8	10.3	11.6	12.2
Estimated Outlays	2.9	8.3	10.3	11.5	12.2

The costs of this bill fall within function 700.

Basis for Estimate:

The following section-by-section analysis addresses only those sections that would be expected to have a budgetary impact. All sections are assumed to be effective October 1, 1983.

Section 103: This section would expand the maximum number of members on the Board of Veterans Appeals (BVA) from 50 to 65 members.

(by fiscal year, in millions of dollars)

	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>
Estimated					
Authorization Level	1.3	3.6	4.4	4.7	4.9
Estimated Outlays	1.2	3.4	4.4	4.6	4.9

The above estimate assumes that the 15 new Board members and 83 additional full-time equivalent employees (FTEE) for advisory and administrative support staff would be hired over the two-year period following the effective date of the bill, which was assumed to be October 1, 1983. Based on the 1982 ratio of staff to Board members, it was estimated that 32 attorney advisors and 51 administrative positions would be needed to support the expanded membership of the Board. The average salary level for attorney positions was assumed to be GS-13/2 and for administrative positions, GS-5. The new Board members were assumed to be hired at the ES-5 level. Salary levels were inflated in the outyears by CBO's index of projected federal payraises. Non-recurring costs for furniture and equipment were assumed to be \$2,000 per new employee. Recurring administrative costs--exclusive of personnel costs--were assumed to be similar to the current nonpersonnel operating costs of the Board per FTEE and were inflated in the outyears by CBO's composite index for federal purchases of nondefense goods and services.

Section 108: This section would provide that, when there is substantial disagreement between the opinions of two physicians in an appeal case, the claimant can request that an independent medical opinion be obtained at VA expense.

It is not expected that a sufficient number of cases would require an independent medical opinion for this provision to result in a significant cost.

Section 110: This section would authorize the Administrator of Veterans Affairs to conduct a study in order to evaluate the feasibility and desirability of two alternative methods of resolving disputed claims for benefits. One method would involve an intermediate-level appeal hearing before a panel of three members of VA's adjudication staff who have had no prior involvement with the case. The other approach to be tested would entail BVA panels conducting formal recorded hearings in certain regional offices on at least a quarterly basis.

Since each test program would involve only three regional offices, it is expected that VA should be able to conduct the study with few additions to existing personnel. Some travel expense would be incurred by BVA; but this, combined with any potential personnel costs, should not be significant.

Title III: This title would authorize access to the federal court system for veterans and their survivors to appeal disputed decisions of the Board of Veterans Appeals rendered on or after April 1, 1982.

(by fiscal year, in millions of dollars)

	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>
<u>Function 700 Impact</u>					
<u>Estimated</u>					
Authorization Level	1.1	2.9	3.2	3.4	3.6
Estimated Outlays	1.0	2.7	3.2	3.4	3.6
<u>Function 750 Impact</u>					
<u>Estimated</u>					
Authorization Level	0.8	2.3	2.7	3.5	3.7
Estimated Outlays	0.7	2.2	2.7	3.5	3.7

This provision would impact on the workload of the Board of Veterans Appeals (BVA), the Department of Veterans Benefits (DVB), and the Office of the General Counsel in the VA and would add to the caseload of federal district and circuit courts. The increase in the staff of BVA provided by section 103 of this bill should be sufficient to accommodate the growth in their workload. The additions to DVB staffing necessary to handle the processing of remands from the courts would be small, only about 10 FTEE, at less than \$400,000 a year. The General Counsel's office would be affected more than any other in VA by this provision. Since this staff would be required to litigate the appeals, it is estimated that an additional 82 FTEE would be needed at a cost of more than \$3 million. The Department of Justice has estimated that an additional eight district court judges and one circuit court judge would be needed to handle the influx of veterans' benefit cases into the federal court system. Although this bill does not authorize the establishment of any new judgeships, the estimate assumes that such authorization would be forthcoming.

The above estimates are based on the following assumptions and methodologies:

- o It was assumed, based on a BVA estimate, that the rate at which cases are denied by BVA will drop from its present level of 70 percent to about 60 percent with the use of independent medical opinions' (as authorized by section 108) and precedent decisions.
- o It was assumed that 15 percent of the cases denied by BVA would be appealed. The Social Security Administration (SSA) has experienced an appeal rate of approximately 20 percent of denials. It is expected that VA claims would show a lower appeal rate, because, unlike Social Security, it is current practice at VA (and it would be mandated by section 101) to resolve issues in which the evidence is equally balanced in favor of the claimant.
- o It was assumed that 30 percent of the appealed cases would be remanded for further action and development, based on SSA experience.
- o Although all provisions of the title were assumed to be effective on October 1, 1983, full steady-state operation and staffing levels were not assumed to be achieved until fiscal year 1986.
- o All personnel costs were inflated by the CBO projection of federal pay raises.
- o Non-salary personnel benefit costs were assumed to be 30 percent of salary costs.
- o All other operating costs were increased in the outyears by the appropriate CBO projection of inflation.

It should be noted that the expansion of the appeals process for VA decisions would probably result in some new awards that would not otherwise have been approved. While it is not possible to estimate with any precision the benefit cost of the new awards, it is not expected to be significant.

6. ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS:

The Congressional Budget Office has determined that the budgets of state and local governments would not be directly affected by the enactment of this bill.

- 7. ESTIMATE COMPARISON: None.
- 8. PREVIOUS CBO ESTIMATE: None.
- 9. ESTIMATE PREPARED BY: K.W. Shepherd (226-2820)
- 10. ESTIMATE APPROVED BY:

C. J. Mueckel
 for James L. Blum
 Assistant Director for
 Budget Analysis

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact which would be incurred in carrying out the Committee bill. The results of that evaluation are described below.

S. 636 as reported has five titles: I—Adjudication procedures; II—Veterans' Administration rule making; III—Judicial review; IV—Attorneys' fees; and V—Effective dates.

A. *Estimates of the number of individuals and businesses who would be regulated, and a determination of the groups and classes of such individuals and businesses:*

Title I.—Title I would codify internal adjudications procedures with respect to VA benefits within the VA for the purpose of providing statutory procedural protections for claimants while maintaining the informality that characterizes VA proceedings at present; would provide for the development of an administrative record in claims adjudications that will enable a reviewing court to understand and evaluate the proceedings in a particular case; and would enhance the agency's ability to carry out its mission after provision is made for judicial review of agency decisions. This title will not result in any regulation of individuals or businesses.

Title II.—Title II would require the VA's rulemaking procedures to be in accord with the relevant provisions in the Administrative Procedure Act. This means that the VA regulations would be required to be promulgated in accordance with the requirements of section 553 of title 5, United States Code, which includes requirements relating to public notice and opportunity for comment in the rulemaking process. The VA states that it has been in voluntary compliance with these requirements for a number of years. This title will not result in the regulation of any individuals or businesses.

Title III.—Title III provides access to the Federal court system for review of VA decisions. No individuals or businesses will be regulated.

Title IV.—Title IV revises the present limitation of \$10 contained in title 38, United States Code, on the amount an attorney may receive for representing an individual with a claim for benefits under laws administered by the VA by providing for the approval by the Administrator of limited attorneys' fees, for representation of individuals before the VA, and for court approval of fees for the representation of such claimants in court proceedings authorized by the new judicial review provisions added to title 38 by title III of the Committee bill. Attorney representation before the VA would be permitted only after a claim had been denied by the BVA; at that point, it would be a matter of right if there were new and material evidence presented in support of the claim, and a matter of discretion with the Administrator if the claimant were to demonstrate good cause for the reopening of the claim. It is not possible to predict with any certainty the numbers of claimants who will retain attorneys to represent them in such subsequent proceedings before the BVA or in the Federal courts. In fiscal year 1981, 33,461 appeals were disposed of by the BVA, and approximately 12.4 percent

of that number were disposed of favorably to the claimant; thus, it is expected that no more than approximately 30,000 claimants would be eligible to retain attorneys in any given year. However, the Committee anticipates that the system of veteran service officer representation (free representation provided by employees of various veterans' groups and other organizations) will remain a very strong and vital force and, as a result, most claimants will not retain private attorneys in VA proceedings.

Title V.—Title V contains an effective date provision and authorizes court review of final VA decisions rendered on or after April 1, 1983. Nothing in this title will result in the regulation of any individuals or businesses.

B. Determination of the economic impact of such regulations on individuals, consumers and businesses affected:

Titles I through V.—No significant economic impact on claimants before the VA (the "consumer" of VA adjudication procedures and judicial review) is expected to result from regulations under these titles.

C. Determination of the impact on the personal privacy of individuals affected:

Title I.—There would be no significant impact on the personal privacy of individuals affected by this title beyond any loss of privacy ordinarily entailed in claiming VA benefits.

Title II.—This title would have no impact on the personal privacy of any individuals.

Title III.—There would be no significant impact on the personal privacy of individuals affected by this title beyond any loss of privacy ordinarily entailed in pursuing a civil remedy in Federal court for the denial of a Federal benefit.

Title IV.—There would be no significant impact on the personal privacy of individuals affected by this title. Individual attorneys would be required to provide justification for fees claimed in conjunction with representing individuals, but such a requirement is in accord with the normal practice in cases in which agency or court approval of a fee award is required.

Title V.—There would be no significant impact on the personal privacy of individuals affected by this title.

D. Determination of the amount of additional paperwork that will result from regulations to be promulgated under the bill:

Title I.—Regulations to be promulgated under this title will generate little or no additional paperwork beyond that ordinarily involved in VA claims adjudication processes. However, additional paperwork will be required of the VA in the form of an annual report on certain aspects of Board of Veterans' Appeals operations from the Chairman of the Board to the Congress on October 1, 1984, and annually thereafter; a report following a discretionary study of alternative methods of speeding claims resolutions at locations convenient to claimants' residences; and in the form of ruling on requests for additional independent medical opinions and the opinions themselves.

Title II.—Since the VA has generally been in voluntary compliance for a number of years with the procedures added to title 38 by this title, mandating such compliance should result in no additional paperwork.

Title III.—The authorizations in this title for judicial review in Federal courts should not result in the promulgation of any additional regulations. However, it is anticipated that this access to court review will result in a significant increase in internal VA paperwork as files are prepared for courts and cases are defended in court.

Title IV.—Pursuant to this title, the Administrator will be required to either approve or deny attorneys' fees for representation of claimants before the VA, resulting in additional paperwork in the form of applications from attorneys and decisions thereon regarding approval of fees. Although all attorneys who represent claimants in matters resolved within the VA will submit such paperwork, it is not anticipated that this requirement will constitute an undue burden on any individual attorney, nor should the paperwork result in significant management problems for the agency.

Title V.—It is not anticipated that any regulations will be promulgated under this title.

SECTION-BY-SECTION ANALYSIS OF S. 636 AS REPORTED

Section 1

Subsection (a) of section 1 provides that this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

Subsection (b) of section 1 provides that, except when otherwise expressly provided, reference to a section or other provision shall be considered to be made to a section or other provisions of title 38, United States Code, relating to veterans' benefits.

TITLE I—ADJUDICATION PROCEDURES

Section 101

Subsection (a) of section 101 would amend chapter 51 of title 38, United States Code, relating to applications for, the effective dates of, and the method of payment of veterans' benefits, to add a new section 3007 codifying, for VA adjudication purposes, the burden of proof and reasonable doubt standards currently provided for by VA regulation (38 CFR 3.102) and the requirement, also in VA regulations, that the VA assist a claimant in developing facts in connection with a claim (38 CFR 3.103). These provisions would be codified in order to ensure that the VA's present practices of making every reasonable effort to assist a claimant and construing the evidence favorably to the claimant are not abandoned in response to the provisions of title III of the bill proposing to amend title 38 to authorize court review. The new section 3007 would provide as follows:

New section 3007.—Burden of proof; benefit of the doubt

Subsection (a) of new section 3007: Would provide that, except when otherwise provided by the Administrator in accordance with provisions of title 38, a claimant would have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that a claim is well grounded and would provide that the Administrator shall assist a claimant in developing pertinent facts. Thus, as presently provided for in VA regulations (38 CFR 3.102), the initial burden of going forward with evidence to estab-

lish all elements of a claim would be on the claimant. This subsection would not affect existing statutory or regulatory procedures that specify different procedures relating to burden of proof (for example, the statutory presumptions relating to certain diseases in section 312 of title 38, United States Code, pursuant to which certain such diseases are considered service connected without a showing that the particular disease existed during active duty service if it became manifest within a specified period after the individual's discharge from such service). In addition, this subsection would codify the obligation of the VA (presently imposed by regulation set forth at 38 CFR 3.103) to provide complete assistance to the veteran or other claimant in the development of a claim.

Subsection (b) of new section 3007: Would provide, without shifting the burden specified in subsection (a) of this section, that, if, after a review of all of the evidence in a case, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the claim, the VA is to give the claimant the benefit of the doubt on each such issue, thus resolving the issue in favor of the claimant. This provision is derived from an existing VA regulation (38 CFR 3.102) but the rules are simplified and the phrase "benefit of the doubt," is used in lieu of the phrase "reasonable doubt" in order to avoid confusion with the meaning of the latter phrase in the criminal law context.

Paragraph (1) of subsection (b) of section 101 would amend the table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title, relating to general administrative provisions, to strike, in the item relating to chapter 51, "Applications" and insert in lieu thereof "Claims" in order to reflect the change made in that chapter heading by paragraph (2) of this subsection.

Paragraph (2) of subsection (b) of section 101 would amend the heading of chapter 51 to read "Chapter 51—Claims, Effective Dates, and Payments" in lieu of "Applications, Effective Dates, and Payments" in order to indicate more accurately the subject matter of that chapter.

Paragraph (1) of subsection (c) of section 101 would amend the table of sections at the beginning of chapter 51 of title 38, United States Code, relating to claims, effective dates, and payments, to strike, in the item relating to subchapter I, "Applications" and insert in lieu thereof "Claims" in order to reflect the change made in that subchapter heading by paragraph (2) of this subsection.

Paragraph (2) of subsection (c) of section 101 would amend the heading of subchapter I of chapter 51 to read "Subchapter I—Claims" in lieu of "Subchapter I—Applications" in order to indicate more accurately the subject matter of that subchapter.

Subsection (d) of section 101 would amend the table of sections at the beginning of chapter 51 of title 38, United States Code, relating to claims, effective dates, and payments to reflect the addition of the new section 3007 proposed to be made by subsection (a) of this section of the Committee bill.

Section 101—Cost.—Enactment of the provisions of section 101 are estimated to entail no costs.

Section 102

Would amend present section 3311, relating to the Administrator's authority to issue subpoenas, to provide that subpoenas authorized under that section may be served either by personal delivery to the person named or by registered or certified mail. This provision is derived from (and intended to have the same substantive effect as) section 205(d) of the Social Security Act (SSA) (42 U.S.C. 405(d)).

Section 102—Cost.—Enactment of this provision would entail no costs.

Section 103

Clause (1) of section 103 would amend subsection (a) of present section 4001, relating to the composition of the Board of Veterans' Appeals, to increase from 50 to 65 the limitation on the size of the Board of Veterans' Appeals membership in order both to ease existing strains on the BVA's docket and to enhance the Board's ability to handle the increased workload, in the form of longer, more detailed opinions and court-ordered remands for further development of the record in individual cases that the judicial review of VA decisions (as would be authorized by the amendments proposed to be made by title III of the Committee bill) is expected to generate; to make a technical amendment in the statutory description of members of the Board (striking "associate" in the description of members of the Board based on the VA's explanation that there is no difference between "members" and "associate members"); and to add language indicating that the Board should dispose of appeals properly before it "in a timely manner."

Clause (2) of section 103, as amended by a Committee amendment to S. 636, would further amend present section 4001 by adding a new subsection (c), as follows:

Paragraph (1) of new subsection (c): Would authorize the appointment of "temporary" members of the Board of Veterans' Appeals for a term of not more than 1 year when there are 65 Board of Veterans' Appeals members, as authorized under section 4001(a) of title 38, as proposed to be amended by section 103(1)(A) of the Committee bill. Only one such member would be authorized to be appointed to any section of the Board.

Paragraph (2) of new subsection (c): Would authorize the appointment of "acting" members of the Board of Veterans' Appeals for a period of not more than 30 days and for not more than a total of 60 days in any single fiscal year. This authority could be exercised when a section of the Board is composed of less than the requisite three members, but no more than one acting member at a time would be authorized to be assigned to any section of the Board.

Paragraph (3) of new subsection (c): Would require the Administrator to include in each year's annual report to the Congress (under present section 214 of title 38) information pertaining to the exercise of the Administrator's authority to appoint temporary members under paragraph (1) of this new subsection, as well as an indication of the number of full-time employee equivalents (FTEE's) appointed as acting members under paragraph (2) of this new subsection.

Section 105 of the Committee bill contains a related provision concerning the effect of a nonunanimous decision by a section of the Board of Veterans' Appeals when one of the members of such a section is either temporary or acting member appointed under this new subsection.

New subsection (d): Would require the Chairman of the Board of Veterans' Appeals to submit a report to the appropriate committees of Congress, not later than December 31, 1984, and annually thereafter, on the Board's activity for the prior fiscal year, together with a projection for the fiscal year in which the report is submitted and the subsequent fiscal year. The report must include detailed information on the Board's workload, including a report on the average length of time cases were before the Board, and an evaluation of the Board's ability, based on existing and projected personnel levels, to dispose of cases before it "in a timely manner" as provided in the amendment to subsection (a) of present section 4001 proposed to be made by clause (1) of section 103 of the Committee bill.

Section 103—Cost.—Enactment of the provisions of section 103 of the Committee bill is estimated to cost \$1.3 million in fiscal year 1984.

Section 104

Would amend present section 4002, relating to the assignment of members of the Board of Veterans' Appeals, to make a technical amendment in the statutory description of members of the Board (that is, to delete "associate" from the description of members of the Board for the reason set forth in the analysis of clause (1) of section 103 of the Committee bill, above).

Section 104—Cost.—Enactment of this provision would entail no costs.

Section 105

Clauses (1) and (2) of section 105 would amend subsections (a) and (b) of present section 4003, relating to determinations by the Board of Veterans' Appeals, to require that the Board, before reversing its prior decision in an individual case on the basis of additional official information from the service department concerned, provide the claimant with notice of such additional information together with an opportunity to be heard in connection with such information.

Clause (2) of section 105 would also add a new paragraph (2) at the end of present section 4003, which would provide that when the two permanent members on a section of the Board which has either a temporary or acting member appointed under new subsection (c) (1) or (2) of section 4001 (as proposed to be added by section 103 of the Committee bill) are split in reaching a decision on a case, the temporary or acting member shall not vote.

Section 105—Cost.—Enactment of the provisions of section 105 are estimated to entail no costs.

Section 106

Would amend present section 4004, relating to the jurisdiction of the Board of Veterans' Appeals, to codify a number of existing

practices of the Board and to clarify other practices and procedures in conjunction with court review of VA decisions, as would be authorized by the amendments proposed to be made by title III of the Committee bill.

Clause (1) of section 100 would amend subsection (a) of present section 4004, relating to a claimant's right to one appeal, which is to be decided by the Board, to provide claimants who have appeals before the Board with the express statutory right to an opportunity for a hearing before the Board, and to require that Board decisions be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law. These changes codify the general practice now followed by the Board, based on the provisions of present section 4005(a) as to a right to hearing (presently set forth in 38 CFR 19.133(a)) and present section 4005(d)(5) as to the record. This latter provision is proposed to be deleted by section 107 of the Committee bill.

Clause (2) of section 100 would amend subsection (b) of present section 4004, relating to the reopening of Board decisions, to eliminate the requirement that new and material evidence sufficient for a reopening of a previously disallowed claim be in the form of "official reports from the proper service department" (this change is consistent with the Board's current practice of allowing previously denied claims to be reopened on the basis of new and material evidence from any source, although the applicable regulation, 38 CFR 19.155, does not clearly articulate this process). A companion amendment would be made in section 111 of the Committee bill as added by a Committee amendment to S. 636, to permit retroactive awards of benefits effective on the date on which an award of benefits under a disallowed claim would have been effective had the claim been allowed, in cases where a disallowed claim is opened on the basis of new material evidence and thereafter allowed and the evidence takes the form of official reports from the proper service department. In addition, clause (2) of this section of the Committee bill would impose a requirement—in lieu of an authorization—of reopening and reconsideration of a claim whenever new and material evidence is secured; would provide for the discretionary reopening and reconsideration of a claim where good cause for reopening is shown; would specify that, with respect to the reopening of claims, the Board may return the claim to the agency of original jurisdiction for action (either on the question of whether the claim is to be reopened or on the merits of the claim, or both); and would specify that a judicial decision (pursuant to the new judicial review provisions added by the amendments made by title III of the Committee bill) upholding, in whole or part, a prior decision of the Board disallowing a claim shall not diminish the Board's authorities to reopen (that is, both the mandatory reopening for new and material evidence, and the discretionary reopening for good cause shown) a claim. The latter provision is designed specifically to make it clear that nothing in the new provisions authorizing judicial review is intended to allow the doctrine of *res judicata* to affect the VA's "open file" system of claims adjudication. Thus, the fact of an adverse court ruling on a claim in no way is intended to preclude a veteran or other claimant from continuing to pursue the

claim by gathering and offering new and material evidence sufficient to reopen the matter.

Clause (3) of section 106 would amend subsection (d) of present section 4004, relating to the form of Board decisions, to require expressly that Board decisions state separately findings of fact and conclusions of law on each material issue in the case and that the Board mail a copy of its final decision to the last known address of the claimant and of the claimant's authorized representative, if any. These requirements would codify current Board practices not expressly provided for in regulation, and would provide a statutory basis for procedures that would precede and should facilitate court review of a matter appealed to court. The date on which the decision is mailed to the last known address of the claimant and the claimant's authorized representative would mark the first day of the 180-day period following a Board decision in which a claimant would be permitted to file a civil action under new section 4025 of title 38 (as added by subsection (a) of section 302 of the Committee bill). The provision relating to the contents of the Board's decision, which is derived from the Administrative Procedure Act (APA) (5 U.S.C. 557(c)), is intended to help ensure that decisions of the Board are sufficiently explicit and detailed so as to enable the claimant to understand clearly the basis of the Board's action and, in the case of an appeal to a court, to enable the claimant to state specific grounds for appealing the decision; and to provide the reviewing court with a basis to understand and interpret the decision of the Board.

Section 106—Cost.—Enactment of the provisions of section 106 are estimated to entail no costs.

Section 107

Would amend present section 4005(d)(5), relating to the Board's disposition of appeals to delete the requirement that the Board base its decision on the entire record, inasmuch as that requirement would be included in present section 4004(a) by an amendment proposed to be made by section 106(1) of the Committee bill.

Section 107—Cost.—Enactment of this provision would entail no costs.

Section 108

Would amend present section 4009, relating to the obtaining of independent medical opinions by the Board in medically complex or controverted cases, to add a new subsection (c), as follows:

New subsection (c): Would provide the claimant with the right to request an independent medical opinion when, in a case before the Board, there is a substantial disagreement between the substantiated findings or opinions of two physicians with respect to a material issue in the case and the Board cannot resolve the disagreement in any other way (for example, by interrogatories to one or both physicians, probing the basis for such physician's findings or opinion). In the case of a denial of such a request, the Board would be required to provide the claimant and the claimant's authorized representative, if any, with a statement of its reasons for denying such request, but the Board's decision on such a request would be com-

mitted to agency discretion and thus would be final and not subject to judicial review.

Section 108—Cost.—Enactment of this section is estimated to entail no significant costs.

Section 109

Would amend chapter 71 of title 38, United States Code, relating to the Board of Veterans' Appeals, by adding two new sections, one establishing certain procedures to be followed in adjudicatory proceedings within the VA (largely derived from provisions of the APA (5 U.S.C. 554, 555, and 556)) and the other setting forth requirements for the Administrator to apprise claimants of their procedural rights before the VA.

Subsection (a) of section 109 would amend chapter 71 by adding two new sections, as follows:

New section 4010.—Adjudication procedures

Subsection (a) of new section 4010: Would authorize the Administrator, in any hearing, investigation, or proceeding in the VA, in connection with a claim for benefits under laws administered by the VA, to administer oaths, examine witnesses, and take evidence. The statutory granting of this fundamental authority codifies existing VA practice, derived, insofar as subpoenaed witnesses are concerned, from present section 3311 though not required by a specific regulation; it is based on an APA provision (5 U.S.C. 556(c)) and is similar to SSA section 205(b) (42 U.S.C. 405(b)).

Subsection (b) of new section 4010: Would provide for the admission of any evidence in VA proceedings, including proceedings before the Board, even evidence that would be inadmissible under the rules of evidence applicable in judicial proceedings, except that the Administrator would be authorized to prescribe regulations allowing exclusion of irrelevant, immaterial or unduly repetitious evidence. This provision, which is based on similar APA (5 U.S.C. 556(d)) and SSA provisions (42 U.S.C. 405(b)), generally codifies the existing VA regulation, 38 CFR 19.133(c).

Paragraph (1) of subsection (c) of new section 4010: Would specify certain procedural rights of claimants in proceedings before the Board of Veterans' Appeals, the first four of which are derived from the APA (5 U.S.C. 556(d)). Thus, the provisions of paragraph (1) of subsection (c) of this new section would give the claimant or the claimant's authorized representative the right, at any time "in the course of any proceeding before the Board" (a phrase which the Committee intends to encompass the period beginning with the filing of the notice of disagreement by the claimant under section 4005(a) of title 38, and ending with a final decision of the Board), to:

Examine the contents of the case files and all documents and records that the VA plans to use in the proceeding and, on the payment of a fee, prescribed pursuant to present section 3302(b), not to exceed the direct cost of duplicating the materials, the right to obtain copies of all such materials.

Present witnesses and evidence restricted only by regulations of the Administrator relating to irrelevant, immaterial, or unduly repetitious evidence as authorized by proposed subsection (b) of this section.

Make arguments to the Board, both orally and in the form of a written brief or similar document, whether submitted during or after the hearing to which they relate, on both substantive and procedural issues.

Submit rebuttal evidence.

Present medical opinions as part of the case, and request an independent medical opinion pursuant to new subsection (c) to present section 4009 (as proposed to be added by section 108 of the Committee bill).

Serve on any person written interrogatories that would have to be answered in writing separately and under oath unless the person served makes an objection to the Administrator. (Paragraphs (3) and (4) of this subsection, discussed below, provide specific procedures for objection to and enforcement of such interrogatories.)

Paragraph (2) of subsection (c) of new section 4010: Would provide that the fee provided for in clause (1)(A) of this subsection for the reproduction of the contents of case files and all materials that the VA plans to use in the proceeding may be waived, pursuant to regulations that the Administrator shall prescribe, either on the basis of a party's inability to pay or for other good cause.

Paragraph (3) of subsection (c) of new section 4010: Would provide that, in the event an individual served with interrogatories under paragraph (1) of this subsection objects to some or all of the interrogatories, the Administrator would be required, pursuant to regulations which the Administrator must prescribe establishing standards consistent with standards for protective orders applicable in United States District Courts (currently Rule 26(c) of the Rules of Civil Procedure for United States District Courts), to evaluate the objection and either order the interrogatories to be answered as served or as modified by the Administrator, or order that the interrogatories need not be answered. In this manner, the Administrator would be available to protect against the use of interrogatories to harass or unduly burden the person served with the interrogatories.

Paragraph (4) of subsection (c) of new subsection 4010: Would provide that, if a person served with interrogatories under paragraph (1) of this subsection fails to answer or to provide responsive answers and the party serving the interrogatories shows the general relevance and reasonable scope of the evidence sought, the Administrator is to issue a subpoena pursuant to present section 3311 of title 38 with enforcement pursuant to present section 3313 of title 38, United States code, to require the person served with the interrogatories to appear at a deposition on written questions at a location within 100 miles of the witness' residence or place of work. This procedure for enforcing the interrogatories, together with the check provided by the Administrator's evaluation of any objection, is designed to prevent abuse of this discovery tool while providing a claimant with a means of obtaining relevant evidence that would otherwise be unavailable to the claimant. The provisions relating to the use of interrogatories are proposed in lieu of allowing a claimant to subpoena a witness to appear at a Board hearing for the purpose of cross-examination by the claimant or the claimant's authorized representative because of concern that such cross-exami-

nation would not be consistent with the goal of conducting proceedings by the Board in a nonadversarial fashion.

Subsection (d) of new section 4010: Would provide authority for a hearing officer in any VA proceeding to disqualify himself or herself because of personal bias or other cause and also would provide authority for a party to challenge a hearing officer on such basis. This provision is derived from the APA (5 U.S.C. 556(b)).

Subsection (e) of new section 4010: Would specify that the administrative record in a case would consist of the transcript or recording of testimony and the exhibits, all papers and requests filed in the proceeding, and the decision of the Board; and would require the Administration to provide copies of the record to the claimant upon payment of a reasonable fee, prescribed pursuant to present section 3302(b) of title 38, for the direct cost of duplicating the contents of the record for the claimant. The duplicating fee would be waivable on the basis of a party's inability to pay or for other good cause shown.

Subsection (f) of new section 4010: Would specify that, notwithstanding any other provision of law, the adjudication and hearing procedures contained in title 38, and in regulations prescribed by the Administrator thereunder are exclusive. This provision is designed to preclude judicial incorporation of other procedures from the Administrative Procedure Act or elsewhere and, thus to ensure that VA procedures remain informal and nonadversarial in nature.

New section 4011.—Notice of procedural rights: Would require the Administrator to provide, at each stage of the proceedings before the VA, notice, in easily understandable language, to a claimant of procedural rights and the procedures available to obtain various opportunities for review. The purpose of proposed new section 4011 is to protect the procedural rights of claimants by insuring that they are fully informed at each dispositive stage in the administrative process with respect to their opportunities for further review. As used in that section, the term procedural stage relating to disposition of a claim refers to a step in the administrative process at which a decision is reached on a matter relating to the substantive or procedural rights of a claimant. Steps at which notification of procedural rights may be necessary include: notification of an initial decision on a claim for benefits, furnishing of a statement of the case, notification of a Board of Veterans' Appeals decision, and notification of a decision on remand from the Board. Notice of procedural rights is intended to assist claimants in pursuing their claims for benefits with the VA. The Committee believes that this provision can be implemented without costly addition to prevailing Agency practice regarding notice of procedural rights, and that the assistance can be provided without repetitious mailings and lengthy, technical notices. In this regard, it is intended that the Agency rely on easily understood, standardized forms, each of which emphasizes rights available at a particular stage in the administrative process. This provision is also designed to assure that, where there are substantial populations of veterans with limited English-language proficiency, this notice is provided in a language other than English, such as Spanish, which is spoken by a significant percentage of the clientele of the particular VA facility.

Subsection (b) of section 109 would amend the table of sections at the beginning of chapter 71 to reflect the addition of new sections 4010 and 4011 proposed to be made by the amendments in subsection (a) of this section of the Committee bill.

Section 109—Cost.—Enactment of the provisions in section 109 is estimated to entail no significant costs.

Section 110

Would authorize the Administrator to conduct a study, commencing not more than one year after the date of enactment of this bill, of alternative methods of providing speedier claims resolution at locations convenient to claimants' residences. The study could include either or both of two alternative procedures: First, in not more than three geographic areas, a procedure utilizing an intermediate review panel of regional office personnel from the Department of Veterans' Benefits, which would conduct a *de novo* review of the claim prior to any appeal to the Board of Veterans' Appeals; and, second, in not more than three other geographic areas, an enhanced schedule of visits by traveling panels of the Board of Veterans' Appeals (on at least a quarterly basis). If such a study were conducted, the Administrator would be required to report to the Congress on the results of the study, including an evaluation of the cost factors associated with each alternative and the impact on the workload of the regional offices involved and the Board of Veterans' Appeals resulting from each alternative, together with any recommendations for administrative or legislative action, or both, as may be indicated by the study.

Section 110—Cost.—Enactment of this provision is estimated to entail no significant costs.

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

Section 201

Subsection (a) of section 201 would amend subchapter II of chapter 3 of title 38, United States Code, relating to various administrative matters pertaining to the Veterans' Administration, by adding a new section 221, as follows:

New section 221.—Rule making: Would provide that, notwithstanding the preclusion in section 553(a)(2) of title 5, United States Code, of matters involving "loans, grants, benefits, or contracts" from Administrative Procedure Act rulemaking procedural requirements, the VA's rulemaking procedures must be in compliance with the provisions of the Administrative Procedure Act section relating to rule making, section 553 of title 5, United States Code, in connection with any matter other than those involving agency management, personnel, or public property or contracts. Matters which would thus be made subject to the rulemaking requirements of the Administrative Procedure Act would include those involving VA benefits and loans. This section would generally codify the current VA regulations, 38 CFR 1.12.

Subsection (b) of section 201 would amend the table of sections at the beginning of chapter 3 of title 38, United States Code, relating to general administrative matters pertaining to the Veterans' Ad-

ministration, to reflect the addition of the new section 221 proposed to be made by subsection (a) of this section of the Committee bill.

Section 201—Cost.—Enactment of this provision is estimated to entail no costs.

TITLE III—JUDICIAL REVIEW

Section 301

Would amend section 211(a) of title 38, United States Code, relating to decisions by the Administrator, which generally precludes judicial review of decisions of the Administrator in matters relating to claims for benefits under laws administered by the VA, to add to the matters to which such preclusion does not apply, subchapter II of chapter 71, the new judicial review subchapter proposed to be added by section 302 of the Committee bill.

Section 301—Cost.—Enactment of this provision is estimated to entail no costs.

Section 302

Subsection (a) of section 302 would amend chapter 71 of title 38, United States Code, relating to the Board of Veterans' Appeals, to add a new subchapter II, entitled "Judicial Review", which would authorize and prescribe procedures for access to the Federal court system for review of certain VA decisions and would consist of new sections 4025 through 4029, as follows:

New section 4025.—Right of review; commencement of action: Would establish a right of review in Federal court for the review of a case involving a claim for benefits under laws administered by the Veterans' Administration and would set forth procedures related to bringing an action for such review.

Subsection (a) of new section 4025: Would define (1) "final decision of the Administrator", as used in subsection (b) of this new section, to include not only a decision on the merits pursuant to section 4004(a) (as proposed to be amended by section 106 of the Committee bill), but also a refusal to reopen a claim pursuant to section 4004(b) (as proposed to be amended by section 106 of the Committee bill), or a refusal on the basis of nonconformity with present chapter 71 provisions relating to form or manner of appeals actions, pursuant to present section 4008, or on the basis of a lack of timeliness, pursuant to present section 4005, to consider a claim, and (2) "claim for benefits", as used in subsection (b) of this new section and elsewhere in this new judicial review subchapter, to include not only an initial claim filed under present section 3001 of title 38 but also a challenge to a decision reducing, suspending, or terminating a benefit as well as any request by or on behalf of a claimant for reopening, reconsideration, or further consideration of either an initial claim or a challenge to a decision reducing, suspending, or terminating benefits. This definition of "claim for benefits" is intended to remove any possible doubt that the provisions authorizing a right to judicial review apply in cases other than initial claims for benefits.

Subsection (b) of new section 4025: Would provide for court review of a "final decision" (as defined in subsection (a) of this new section) in a matter involving a claim for benefits (also as defined

in subsection (a) of this new section) under laws administered by the Veterans' Administration. A civil action seeking such review could be brought in Federal district court in either the home district of the claimant or in the district court where the Board of Veterans' Appeals is situated (presently the District of Columbia), and must be brought within 180 days (the same period as is allowed for bringing an action in Federal court in connection with a tort claim against the United States, as provided for in 28 U.S.C. 2401(b), following final denial of such claim by the Federal agency involved, as required by 28 U.S.C. 2675(a)) after the notice of the Board of Veterans' Appeals decision is mailed to the claimant pursuant to new section 4004(d) (as proposed to be added by clause (3) of section 106 of the Committee bill).

Subsection (c) of new section 4025: Would require that the complaint in a case seeking court review of a decision relating to a claim for benefits, brought pursuant to subsection (b) of this new section, shall include sufficient information in the complaint (for example, the date of the final Board of Veterans' appeals decision and the claimant's VA claim number) to assist the VA in identifying and locating the claimant's file.

Subsection (d) of new section 4025: Would require the Administrator to file with the court, not later than 30 days after filing the answer to the complaint, certified copies of all of the records upon which the findings of fact and decision complained of are based or, if the Administrator determines that the cost of filing all of those records would be unduly expensive, would permit the Administrator to file a complete index of all of the materials comprising these records. If such an index is filed, the reviewing court would consider requests from all parties for the filing of specific record materials and, thereafter, would order the Administrator to file certified copies of the indexed items that the court deems relevant to its consideration of the case.

Subsection (e) of new section 4025: Would provide that the court has the power to dispose of a case on the pleadings and record certified under subsection (d) of this new section. It is anticipated that the court's use of this authority should reduce unnecessary expenditures of judicial resources. As noted in the "Final Report—Study of the Social Security Administration Hearing System" by the Center for Administrative Justice (October 1977): "The amount of time invested in average case [under the SSA] is undoubtedly very small. Most disability cases present simple issues. There is no trial and often not even an oral appearance."

Subsection (f) of new section 4025: Would limit judicial review as provided for in subsection (b) of this new section to cases in which the initial claim for benefits is filed with the Administrator (pursuant to present section 3001(a)) by the end of the fifth fiscal year after the fiscal year in which the Act becomes effective, and would further require that the complaint initiating the Federal district court action be filed within 180 days after notice of the first final BVA decision rendered after that fifth year is mailed to the claimant under section 4004(d) of title 38, as proposed to be amended by section 106 of the Committee bill. The term "first final decision" of the BVA is defined to include a decision based on a reopening for new and material evidence, as long as the reopening occurs within

180 days after the mailing of notice under such amended section 4004(d). These provisions would have no effect on the availability of remedies under new subchapter II of chapter 71 in connection with any claim filed within the time limits. This "sunset" provision on new claims is intended to require the Congress to evaluate the new judicial review provisions before making such provisions permanent or extending them further. In addition, this subsection would preclude actions being brought under this new section regarding matters under present chapter 19 of title 38, relating to insurance, and under present chapter 37 of title 38, relating to home, condominium, and mobile-home loans and loan guaranties. There are currently in both chapters provisions for, and procedures established relating to, judicial review, and no need to change such procedures has been suggested or shown.

New section 4026.—Scope of review: Would define a reviewing court's role in considering actions brought under the proposed new judicial review chapter. The provisions are derived, with certain modifications, from the APA scope of review provisions in 5 U.S.C. 706.

Clause (A) of paragraph (1) of subsection (a) of new section 4026: Would authorize a reviewing court to decide all relevant questions of law and interpret constitutional and statutory provisions and to determine the meaning or applicability of the terms of an action of the Administrator. As discussed above with respect to subsection (b) of new section 4025 (as proposed to be added by this subsection of the Committee bill), there is an emerging body of case law which holds that courts are not barred by present section 211(a) from reviewing questions relating to the legal authority of the Administrator, under the Constitution or statutory provisions, in matters not directly relating to claims for benefits (for example, the decision in *Plato v. Roudebush*, 397 F. Supp. 1295 (D. Md. 1975), where the court permitted a constitutional challenge to VA procedures relating to pension benefit terminations). This new provision expands that case law to include questions of law in cases involving claims for benefits.

Clause (B) of paragraph (1) of subsection (a) of new section 4026: Would authorize a reviewing court to compel action of the Administrator that the Administrator has unlawfully withheld.

Clause (C) of paragraph (1) of subsection (a) of new section 4026: Would define the court's authority to hold unlawful and set aside decisions, findings, and conclusions of the Administrator—except findings of material fact made in reaching a decision on a claim for benefits, the review of which would be governed solely by clause (4) of this subsection, discussed below. Specifically, the court would be empowered to reverse a decision of the Administrator if such a decision is found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; (C) in excess of statutory jurisdiction, authority or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law. As noted above, this authority to reverse is largely derived from the APA.

Clause (D) of paragraph (1) of subsection (a) of new section 4026: Would provide that, in the case of a finding of material fact made

in reaching a decision on a claim for benefits, a court is empowered to hold unlawful and set aside such a finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside. Under paragraph (2) of subsection (a) of this new section, this authority is specifically limited so as to require the court, before setting aside the finding, to specify where it finds the record to be deficient and to remand the case once, for a time-limited period, to allow the Administrator either to reconsider the decision or substantiate the record. It is the Committee's intention that this limit on a reviewing court's authority to set aside findings of fact in individual claims cases, together with the provision limiting court review of factual issues in such cases to an evaluation of whether a finding is so utterly lacking in a rational basis as to result in a manifest and grievous injustice, should serve to restrict court review of factual matters substantially more tightly than is the case where review is authorized (as in the APA, 5 U.S.C. 706) to determine whether a Federal agency's decision on a factual issue is "supported by substantial evidence".

The Committee takes note of certain views of the Department of Justice submitted to the Committee on the Judiciary on August 17, 1982, at a time subsequent to the reporting and discharge of S. 349 (the predecessor in the 97th Congress of S. 636) from the Veterans' Affairs and Judiciary Committees. In that letter, concerns were expressed that the new standard of factual review contained in new section 4026, as proposed to be added to title 38 by section 302 of both S. 349 and S. 636, might present significant problems of judicial construction, by requiring reviewing courts to engage in what the Department of Justice perceives to be a complicated three-part test. As stated in the letter: "A court will be required to determine what degree of evidence constitutes a 'rational basis' for a finding, how far removed from a 'rational basis' a finding may be before it is deemed to cause 'a manifest and grievous injustice,' and what degree of hardship must be present before a finding cause 'a manifest and grievous injustice.'" The end result of this process, it was stated, could in effect approximate a "substantial evidence" standard.

The Committee must emphasize once again that the judicial review provisions of this legislation were specifically designed to provide for a far more restrictive scope of review than is available under the "substantial evidence" test—in order to preclude reviewing courts from simply substituting their judgment for that of the agency—and to do so by means of a standard so strongly worded as to leave no question as to the intent of the Congress. The standard established under the present clause should be viewed as a unit, not dismantled into three or more disparate and unconnected parts. The Committee notes that, had it intended that a reviewing court should make separate findings as to whether there is a "rational basis" and whether "a manifest and grievous injustice would result," it would have framed these two elements in two separate clauses. By not adopting that approach, the Committee emphasizes that it intends that reviewing courts should pursue a straightforward, one-step inquiry into whether the court is certain that the agency was wrong. To the extent that the reviewing court

has any uncertainty as to the meaning of this standard, it is expected that clarification will be sought from the legislative history first and foremost, rather than thorough independent judicial construction.

The Committee also notes with concern that the views submitted by the VA at the Committee's March 23, 1983 hearing, proceed upon the assumption that the standard established by the Committee under this clause is nothing more than a "rational basis" test, and that such a standard is of uncertain scope and will invite *de novo* review and substitution of judgment by reviewing courts on factual matters. The Committee cannot emphasize too strongly that to equate the standard of "so utterly lacking in a rational basis in the evidence that manifest and grievous injustice would result" with a mere "rational basis" test is entirely unsupported by and contrary to the express language of the statute and the clear intent of the Committee as set forth in report language. As the Committee report on S. 349 makes abundantly clear, the Committee has expressly rejected the present Administrative Procedure Act formulation of the "arbitrary and capricious" test, because of the considerable judicial confusion that exists as to its precise meaning, and has crafted instead the new standard contained in the Committee bill essentially to clarify its intention to allow only a very narrow review of factual determinations in individual benefits adjudications, and to ensure that this intention will be followed by the courts and will not be frustrated by judicial practice developed in other contexts. Thus, the ultimate intent of the new standard provided in this clause is to preserve the role of the Board of Veterans' Appeals as the primary expert arbiter of factual matters involving claims for VA benefits.

Paragraph (2) of subsection (a) of new section 4026: Would, as noted above in the analysis of clause (D) of paragraph (1) new section 4026(a), limit a court's authority under that claim to set aside a finding of material fact made in reaching a decision in a claim for VA benefits. Thus, the court, before setting such a finding aside, would be required to specify where it finds the record to be deficient and to remand the case once, for a time-limited period, to allow the Administrator either to reconsider the decision or substantiate the record. In remanding the case under this paragraph, the court would be required to specify a reasonable period of time for the Administrator to complete action under the remand. If the Administrator has not completed action within the specified period of time, the case would be returned to the court at the end of that period for further action by the court.

Subsection (b) of new section 4026: Would incorporate the rule of prejudicial error from the APA (5 U.S.C. 706) in order to define further a reviewing court's role. Thus, pursuant to this rule, a court would be expected to disregard errors in the administrative record that are not significant to the outcome of the matter.

Subsection (c) of new section 4026: Would clarify a reviewing court's role in relation to questions of fact decided by the Administrator by specifying that in no event shall such findings be subject to a trial *de novo* in the reviewing court.

Subsection (d) of new section 4026: Would provide that, in reviewing a matter resolved by the VA solely on the basis of a failure to

conform to VA regulations or procedures, the reviewing court may consider only those issues relating to the validity of or conformity with the regulation or procedure. Thus, if a court were to uphold the validity of a regulation or procedure and its application to the facts of a case, the matter would be ended; but if, on the other hand, the court were to rule that the regulation or procedure is unlawful, the underlying claim for benefits must be returned to the VA for its consideration, and the VA's role as the principal arbiter of VA claims matters would thus be preserved. The Committee notes that, in the context of court review of the validity of or conformity with a VA regulation or procedure, VA factual determinations primarily associated therewith—for example, a determination that a claimant had not in fact met a particular filing deadline—are not intended to be subject to review as a finding of material fact made in reaching a decision on a claim for benefits under section 4026(a)(1)(D) as proposed to be added to title 38 by this section of the Committee bill. Such determinations should be reviewed under this subsection according to the appropriate standards of review otherwise contained in proposed new section 4026(a)(1)(C).

New section 4027.—Remands: Would provide for three different types of remands (two mandatory and one discretionary), in addition to the mandatory remand provision to be provided for under new section 4026(a)(4). Under the first, the court would be required to remand the case, if the Administrator so requests after it is appealed to court and before the Administrator files an answer, for a single reconsideration by the Administrator, which must be completed within 90 days or the matter would be returned to court. This provision is derived from a similar one in the SSA (42 U.S.C. 405(g)) but modified to place a specific limit on the amount of time allowed before the case must be returned to court. The second remand provision would allow the reviewing court, in its discretion, to remand a case for further action after the Administrator has filed an answer. The third remand provision would require a court to remand a matter when either party applies for leave to adduce further evidence and shows "good cause" for the remand. In the Committee's view, the burden of showing good cause for the remand should be applied to protect parties and administrative and judicial processes from dilatory practices but not so as to create undue impediments to the Administrator's consideration of additional evidence bearing on the merits of a claim. The new section would thus authorize a reviewing court to specify a time period within which the Administrator must act on a matter remanded under either the second or third remand provisions in this new section.

New section 4028.—Survival of actions: Would provide that actions brought under new section 4025 would survive the tenure of any individual as Administrator.

New section 4029.—Appellate review: Would provide that decisions of district courts pursuant to the new judicial review chapter would be subject to review in higher Federal courts in the same manner as other civil judgments.

Subsection (b) of section 302 would amend the table of sections at the beginning of chapter 71, relating to the Board of Veterans' Ap-

peals, to reflect the addition of the new subchapter II proposed to be made by subsection (a) of this section of the Committee bill.

Section 302—Cost.—Enactment of this provision is estimated by the Congressional Budget Office to result in costs of \$1.1 million to the Veterans' Administration in fiscal year 1984 and of \$0.8 million to the Federal court system. This latter cost estimate assumes that additional judgeships (and supporting staff) would be authorized by the Congress to deal with the judicial workload generated by allowing court review of VA decisions. This assumption may prove to be fallacious in light of the enactment of Public Law 95-486 in the 95th Congress which authorized an additional 117 district court judgeships and 35 circuit court judgeships. Although it is clear that these additional judges were designed to reduce the Federal court workload existing at that time, it seems unlikely that the Congress would be prepared to act to add still more new judgeships so soon after such a significant increase. In any event, it is clear, as noted in the cost estimate of the Congressional Budget Office, that the Committee bill does not authorize any additional judgeships and any such authorization, and attendant cost, would have to be considered separately.

Section 303

Would amend present section 1346 of title 28, United States Code, relating to the jurisdiction of Federal district courts when the United States is the defendant, to provide that the exclusion contained therein limiting the jurisdiction of Federal district courts in matters involving pensions shall not apply to VA pension matters. This is a conforming amendment to effectuate the purpose of the new subchapter II of chapter 71 that would be added by section 302 of the Committee bill.

Section 303—Cost.—Enactment of this provision is estimated to entail no costs.

TITLE IV—ATTORNEYS' FEES

Section 401

Would amend present section 3404 of title 38, United States Code, relating, in connection with VA proceedings, to the recognition of agents and attorneys and to attorneys' fees, to revise the present title 38 limitation of \$10 for claimants' attorneys' fees by providing for the approval by the Administrator of reasonable attorneys' fees, within certain specified limits, for representation of individuals before the Veterans' Administration following an initial decision of the Board of Veterans' Appeals, and for approval by the court of a reasonable attorneys' fees in cases appealed to court.

Clause (1) of section 401 would amend present subsection (c) of present section 3404, to provide for approval by the Administrator of attorneys' fees above the present \$10 maximum for services rendered in representing a claimant following an initial decision of the Board of Veterans' Appeals, but would retain the \$10 maximum limitation for cases resolved prior to Board action or upon the first decision in the case by the Board. As a result of a Committee amendment to S. 636, the Committee bill would also remove an ambiguity as to whether the \$10 limitation applies under current law

to all attorneys practicing before the VA, by deleting the phrase "recognized under this section" from the text of section 3404(c). With respect to claims resolved within the VA but following an initial decision of the Board, the Administrator's approval of an attorneys' fee is limited to:

(A) if the claimant and attorney have entered into a contingent-fee agreement, an amount not in excess of 25 percent of the total of past-due benefits awarded, or

(B) if the claimant and attorney have not entered into such an agreement, the lesser of (i) the fee agreed upon by the claimant and the attorney or (ii) \$500 (an amount which could be increased administratively by the Administrator in future years as warranted by changed economic conditions) except that a greater amount may be approved by the Administrator in an individual case involving extraordinary circumstances warranting such a higher fee.

Thus, approved fees for legal representation before the VA following an initial decision of the Board would generally be limited to a maximum of \$500 unless the claimant and attorney have entered into a contingent-fee agreement and the matter is resolved in a manner favorable to the claimant, in which case the limitation would be 25 percent of any past-due benefits awarded in the claim. The Committee does not anticipate that the Administrator would have occasion to approve a fee in excess of \$500 on the basis of "extraordinary circumstances" except in the most unusual of cases where an attorney is able to demonstrate that the facts and circumstances of the case were so markedly different, in terms of complexity or difficulty, from the average case before the Administrator, that an exceptional amount of time was legitimately required to prepare and present it.

Clause (2) of section 401 would further amend present section 3404 of title 38, United States Code, by adding five new subsections (d) through (h), as follows:

New subsection (d): Would define the court's role in approving attorneys' fees in cases appealed to court under the new judicial review subchapter as proposed to be added by section 302 of the Committee bill. In a case that is resolved in a manner favorable to the claimant (as that result is defined in new subsection (g) of this section), the court may approve a reasonable fee to be paid by the claimant to his or her attorney, with the limitation that, if the claimant and attorney have entered into a contingent-fee agreement, the amount of the fee is limited to 25 percent of the total amount of past-due benefits awarded in the case. In the event that a matter is not resolved in a manner favorable to a claimant in court, the reviewing court may approve a limited reasonable fee, not to exceed \$750, taking into consideration the extent to which success appeared reasonably probable when the action was filed. Of course, where the claimant and attorney have entered into a contingent-fee agreement, no fee could be approved unless court review ultimately results in an award of past-due benefits.

New subsection (e): Would provide authority for the Administrator to authorize payment to an attorney from any past-due benefits that are awarded by the Administrator or a court but would spe-

cifically preclude the VA from making payments out of any future benefits accruing to a claimant on the basis of the action.

New subsection (f): Would limit the applicability of the new attorneys' fees section, section 3404 (as proposed to be amended by this section of this Committee bill), to cases involving claims for benefits under laws administered by the VA. Thus, in all other types of cases (for example, constitutional challenges to regulations, Freedom of Information Act cases, and other claims for relief other than VA benefits) where no claim for benefits is involved, the fee agreement between the individual and the attorney would not be restricted by the provisions of this section.

New subsection (g): Would provide that, for the purposes of this section, a claim is to be considered as having been resolved favorably to a claimant when any or all of the relief sought is granted.

New subsection (h): Would provide that a court may, in its discretion and as an extraordinary remedy, allow a prevailing party, other than the Administrator, (representing the interests of the United States) reasonable attorneys' fees as part of the costs awarded after the decision, in accordance with the provisions (whether expired or not) of section 2412(d) of title 28, relating to awards of attorneys' fees to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity. Section 2412 was enacted in the Equal Access to Justice Act, Public Law 96-481, and is presently subject to a "sunset provision" of October 1, 1984, as provided in section 204(c) of that Act. The Committee notes, however, that legislation is currently pending in the Congress to extend the authority established in present section 2412 of title 28. To the extent that legislation is enacted extending or revising that authority, the Committee intends that awards of attorneys' fees to a prevailing claimant under this subsection of the Committee bill shall be made in accordance with that authority as so extended or revised. In the event that extension legislation is not enacted, the Committee intends that awards of attorneys' fees shall be made in accordance with the provisions of section 2412(d) of title 28 as in effect just prior to the sunset date. This provision is intended to permit a court to evaluate all of the circumstances of a claim and, in particular, the VA's basis for denying the relief requested and its conduct with respect to the claimant. The Committee's intention is that the court's evaluation of the VA's actions be carried out in the same manner as the courts evaluate government agency actions under the Equal Access to Justice Act, where a party other than the government may be awarded attorneys' fees if the government does not prevail and cannot establish that its position was substantially justified.

Section 401—Cost.—Enactment of the provisions in section 401 are estimated to entail no cost.

Section 402

Would amend present section 3405 of title 38, United States Code, relating to penalties for certain acts, to delete a gender reference and to strengthen this provision by making it a Federal criminal offense for an attorney or other person willfully and intentionally to defraud a VA claimant.

Section 402—Costs.—Enactment of this provision is estimated to entail no costs.

TITLE V.—EFFECTIVE DATES

Section 501

Would make the Act effective on the first day of the month beginning 180 days after the date of enactment.

Section 502

Would allow for judicial review, pursuant to proposed new section 4025 (as proposed to be added by section 302(a) of the Committee bill), of decisions of the Board of Veterans' Appeals rendered on or after April 1, 1984.

TABULATION OF VOTES CAST IN COMMITTEE

In compliance with paragraph 7 of rule XXVI of the Standing Rules of the Senate the following is a tabulation of votes cast in person or proxy by Members of the Committee on Veterans' Affairs at an April 20, 1983, meeting to consider S. 636.

The Committee agreed to report S. 636, with amendments, favorably to the Senate by a 12-0 vote, as follows:

YEAS—12

NAYS—0

Alan Simpson
Strom Thurmond
Robert Stafford
Frank Murkowski
Arlen Specter
Jeremiah Denton
Rudy Boschwitz
Alan Cranston
Jennings Randolph
Spark Matsunaga
Dennis DeConcini
George Mitchell

AGENCY REPORT

In lieu of a report on S. 636 from the Veterans' Administration, the full statement of the General Counsel of the Veterans' Administration, appearing before the Committee on March 23, 1983, is included to express that agency's views on the measures pending before the Committee. The prepared statement follows:

STATEMENT OF JOHN P. MURPHY, GENERAL COUNSEL OF THE VETERANS'
ADMINISTRATION

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the Veterans Administration's views on S. 636, 98th Congress, entitled the "Veterans' Administration Adjudication Procedure and Judicial Review Act."

The VA opposes enactment of the bill, and I would like to take this opportunity in appearing here today to provide the Committee with the general basis for our opposition. We are preparing a detailed report which will provide a more complete explanation of our position as well as a detailed analysis of the bill's provisions.

The bill contains four titles which contemplate numerous changes in present law concerning claims for benefits administered by the VA. First, the bill would codify, with some changes, the internal adjudication procedures now used by the Agency in making benefit decisions.

2.

Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act contained in 5 U.S.C. § 553. Third, the bill would provide access to the courts to claimants who are dissatisfied with VA benefit decisions. Finally, the legislation would substantially revise the current \$10 statutory limitation on the fee an attorney may receive for representing an individual claimant in prosecuting a claim for veteran benefits.

In addressing the various features of the bill, we note that the provision of overriding significance to this Agency and to veterans is title III, the provision for judicial review of individual VA benefit determinations. The remaining provisions of the bill largely seek to facilitate implementation of this change. We believe the proposed judicial review of individual VA benefit decisions is inadvisable and unjustified and we therefore oppose adoption of this measure in its entirety.

The principle issue raised by this measure is whether judicial review of individual VA benefit decisions is warranted. We are convinced that our present adjudication procedures provide a fair and efficient means of resolving veteran benefit claims and are preferable to a system involving judicial readjudication of individual benefit decisions. It is our considered opinion that

3.

the informal, non-adversary nature of our claim procedure, combined with our willingness to assist in developing evidence, to provide a personal hearing at virtually any stage of the adjudication process, and to grant a claimant the benefit of the doubt, not only meets the requirements of due process, but provides greater protection to claimants than is available in comparable proceedings at other agencies.

Moreover, the right to appeal and obtain a de novo review by the Board of Veterans Appeals (BVA), without the significant costs of litigation, provides an effective and practical method to correct the few errors that inevitably occur in individual cases in any adjudication system, including the Federal courts. Liberal rules for reopening claims and reconsideration of appeals by the Board also serve to insure justice for VA claimants. The review provided by the Board is independent and the VA has scrupulously maintained this independence.

Likewise, reliance on a centralized body for determination of veterans' benefit claims eliminates the prospect of inconsistent determinations resulting from litigation in the 94 district courts throughout the country. In our view, a veteran's entitlement to benefits is not a matter which varies with geography, and a veteran should not be subjected to a system in which the resolution of a claim may differ depending on the judicial district in which the veteran resides. We believe the BVA offers a more consistent and systematic approach to claim adjudication, without the frustrating cost and delay inherent in litigation.

4.

The traditional arguments in support of judicial review of individual VA benefit decisions can be briefly summarized as follows:

1. Because of the tremendous volume of claims that are processed annually and the thousands of appeals filed, there is a significant opportunity for injustice to occur in the VA system;

2. The distinction between veterans and the claimants for other Federal benefits who are permitted access to the courts is unwarranted and should be eliminated; and

3. The lack of judicial review unconstitutionally denies veterans due process in the handling of their claims.

The initial persuasiveness of these arguments disappears under careful analysis. The first argument seeks to support the necessity for judicial review on the basis of a possibility of injustice. In fact, however, there is nothing to indicate that the current preclusion of judicial review results in injustice. To the contrary, as noted in this Committee's report on S.349, 97th Congress, there is no evidence that most VA claimants are not satisfied with the resolution of their claims for benefits. S. Rep. 97-466, 97th Cong., 2d Sess. 24 (1982).

5.

The argument that veterans have been unfairly singled out in having review of their claims against the Government confined to administrative proceedings also does not withstand scrutiny. Although 38 U.S.C. § 211(a) may be the most visible and widely discussed statute precluding judicial review of administrative action, such statutes are relatively common throughout the Federal Government and continue to be enforced in a variety of situations. The Administrative Conference of the United States has identified some forty examples of statutes precluding or restricting judicial review of administrative action. Linda A. Sedivac, "Congressional and Judicial Limitations on the Reviewability of Certain Administrative Decisions Taken Pursuant to Authority Delegated by Congress", October 1980.

Of course, many of these statutes address specific issues, and some provide an opportunity for review under limited circumstances. The fact remains, however, that judicial review is precluded or severely restricted in such important areas as: selective service classification and processing; grant, denial, and revocation of parole; exclusion orders affecting arriving aliens; and determinations controlling coverage of states and localities under the Voting Rights Act. Particularly analogous is the provision of the Federal Employees Compensation Act, 5 U.S.C. § 8128(b), precluding, in language very similar to that used in section 211(a), judicial review of the grant or denial of compensation to Federal employees suffering work-related injuries. Thus, not only have veterans not

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been singled out for disparate treatment, the informal and supportive nature of the VA's administrative process provides a greater degree of fairness than may be available to participants in many other Federal programs.

The argument that the absence of judicial review of individual VA benefit decisions unconstitutionally denies veterans due process of law in the handling of their claims is likewise in error. Due process does not mandate judicial review.

As the District of Columbia Circuit Court of Appeals explained in DeRodulfa v. United States, 461 F.2d 1240, 1258 (D.C. Cir. 1972),

The Supreme Court has declared that 'the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts;' 'it may,' instead, 'provide an administrative remedy and make it exclusive' That is precisely what Congress did in the current version of Section 211(a), and Congress was well within its legislative prerogatives when it did so.

7.

Quoting from United States v. Babcock, 250 U.S. 328, 331 (1919), and Dismuke v. United States, 297 U.S. 167, 172 (1936)); see also Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 659 (1965). Contrary to the argument advanced, the courts--the branch of Government responsible for determining the constitutional requirements of due process--have not held that the absence of judicial review of individual VA benefit decisions violates due process.

Accordingly, the issue is not one of constitutionality but of preference. The Social Security Administration's experience with judicial review of the Social Security determinations as provided under the Social Security Act demonstrates that judicial involvement in administrative determinations concerning benefits is not preferable. The number of suits challenging Social Security determinations has risen drastically over the years to approximately 25,000 pending cases at the end of 1982. Based on fiscal year 1982 figures, Social Security cases were estimated by the Department of Justice to represent almost fifty percent of all civil actions commenced against the United States. The Department of Justice reported, in commenting on S. 349 in the 97th Congress, that it has experienced serious caseload problems since adoption of the judicial review provision pertaining to Social Security benefit determinations, and that it would expect to encounter a similar caseload expansion as a result of enactment of a judicial review provision affecting the VA.

8.

A comprehensive review of the Social Security Administration adjudicatory process by the Center for Administrative Justice in 1977, in a report entitled the "Study of the Social Security Administration Hearing System", analyzed the contributions of judicial review to the Social Security Administration administrative process. The study concluded that any beneficial effect of judicial review on the accuracy of Social Security Administration adjudications is modest at best, while suggesting that such review may have some negative effects. For example, the study noted that district judges, not being specialists in hearing Social Security cases, may lack the perspective of agency appeals officers in assessing the validity of claims. The study also found that the threat of judicial reversal is in many cases too remote to have a measurable beneficial impact on the diligence of agency adjudicatory officials. The study also indicated that the creation of judicial precedents in individual benefit cases has had little positive impact on the administrative process. Finally, the study questioned the actual legitimizing impact of judicial review on the adjudication process. Given this background, the VA is unwilling to endorse any proposal which would create a system analogous to that involving the review of Social Security claims.

Contributing to the problems inherent in judicial review of VA benefits decisions is the difficulty in defining an appropriate standard of review. We continue to believe that any legislation

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subjecting such decisions to judicial review should be drafted to avoid confusion wherever possible. In our view, it is equally important that judicial review be limited to only those questions suitable for judicial determination, and that complex and technical factual questions that can best and most fairly be decided by the Agency not be subject to readjudication by the courts.

This bill attempts to limit judicial review of agency factual determinations by providing that the district courts shall set aside a finding of material fact made in reaching a decision on a benefit claim, when the finding is "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result" if it were not overturned. We are concerned, however, that the grant of any authority to engage in review of agency factfinding on individual claims may encourage some courts to examine the facts de novo and substitute judicial judgment on factual matters for that of the Agency.

Not only is the standard of factual review that is provided in this bill without statutory or judicial precedent, the meaning of the term "rational basis" is far from settled. Judicial opinions suggest the very real possibility that the rational basis test and the nebulous concept of arbitrary and capricious

10.

agency action may be found to be equivalent. E.g., Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 290 (1974). Thus, adoption of a rational basis test may result in a standard substantially similar to the arbitrary and capricious test previously rejected by the Committee as inappropriate for review of VA factfinding. S. Rep. No. 97-466, 97th Cong., 2d Sess. 44-45 (1982).

The continued presence in the bill of the arbitrary and capricious standard for review of several aspects of VA benefit decisions may superimpose this concept as an alternative test when Agency decisions involve mixed factual and legal issues such as the sufficiency of the evidence relating to a factual matter.

Although this Committee noted the difficulty in distinguishing such issues in its report on S.349, supra at page 42, the scope of review provisions of the bill continue to require the courts to differentiate such issues in determining the appropriate standard to be applied.

Our review of the case law in this area reveals that considerable disagreement has arisen in cases with mixed questions of fact and law involving the application of a legal principle to the facts of

11.

a specific case. Because of the provision in the bill that a court shall set aside decisions of the Administrator other than findings of material fact, where those decisions are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, similar confusion and inconsistency may result in VA benefit cases. That is, some courts may apply the rational basis test to mixed questions while others may use the arbitrary and capricious standard.

Because of the recognized uncertainty surrounding the various standards of factual review, see K. Davis, Administrative Law of the Seventies § 29.00 (1976), and the difficulty courts have in observing statutory distinctions, we are concerned that any standard of review of factual aspects of VA benefit decisions will open the door to confusion and unwarranted judicial intervention. Although the view has been expressed that veterans cannot obtain complete review of their claims without some measure of judicial oversight of Agency factual determinations, we feel the problem of defining a standard which will preclude excessive judicial intrusion into the administrative process makes judicial oversight of fact-finding unworkable.

Further, we believe that judicial review of administrative determinations involving factual issues is particularly inappropriate and unnecessary in the case of the VA, in view of the Agency's liberal policy of assisting claimants in

12.

establishing entitlement to all benefits for which they are eligible under law. Moreover, the importance of judicial review of administrative fact determinations is substantially reduced by the governing principle in VA proceedings that the benefit of the doubt is to be resolved in favor of the claimant.

Additionally, we are concerned that the rational basis test proposed in the bill may interfere with the crucial role of Agency fact-finders in assessing witness credibility at administrative hearings. The potential for difficulty in this area exists because the claimant in a VA claims proceeding may in many cases be the only witness regarding key issues, see Brooks v. Cleland, 531 F. Supp. 103 (E.D. Mich. 1982), and crucial factual determinations may turn on the credibility of his or her testimony. A court applying the rational basis test may be reluctant to uphold an Agency fact-finder's determination, properly based on an assessment of the claimant's credibility, which is inconsistent with the uncontradicted testimony of the claimant. See Dickinson v. United States, 346 U.S. 389 (1953).

The purportedly narrower standard of review included in this bill, as compared with earlier proposals, has not caused us to lower our estimate of the number of cases which would be filed if a judicial

13.

review bill is enacted. We believe that attorneys will simply draft their pleadings in conformance with whatever standard is provided. The Agency decision will presumably be upheld with more frequency with a narrowly drawn standard, but the attendant burdens of litigating a large number of cases in order to vindicate the claims of a few would seem to be a disproportionate allocation of resources.

For all of these reasons, we believe that any attempt to provide judicial review of VA factual determinations regarding benefit claims would be subject to expansive interpretation by the courts and would endanger the proper functioning of the Agency's administrative process, a process that most interested parties agree has provided substantial justice and fair treatment to veterans.

With regard to the remaining provisions of the bill, we note that many of the adjudicatory procedures included in title I merely restate existing agency practices, while others are clearly intended to complement the provisions concerning judicial review contained in title III. Some are administratively burdensome or expensive, with little prospect of worthwhile results from their implementation. In our view, this title is unnecessary in the absence of judicial review and we recommend against its adoption.

14.

With respect to the provisions of title II of the bill, we note that the Agency has voluntarily complied with the rule-making requirements of 5 U.S.C. § 553 since April 1972. At that time 38 C.F.R. § 1.12 was promulgated, expressly requiring notice of regulatory changes to be published in the Federal Register in accordance with section 553. This regulation is binding on all elements of the VA.

Finally, we are not prepared to support the significant alterations to the present statutory attorney fee limitation, 38 U.S.C. § 3404, that would occur under title IV of this bill.

In summary, it is the VA's position that the present system for the informal adjudication of claims for veteran benefits is working efficiently and fairly, and that no widespread injustice has resulted from this system. In view of this record, we believe the potential costs and burdens associated with judicial involvement in the day-to-day process of claims adjudication have not been adequately justified. The remaining major provisions of the bill are largely dependent on the adoption of judicial review of individual VA benefit decisions and are unnecessary in the absence of such review. For these reasons, we oppose passage of S. 636.

CHANGES IN EXISTING LAW MADE BY S. 636 AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

* * * * *

PART IV—JURISDICTION AND VENUE

* * * * *

CHAPTER 85—DISTRICT COURTS; JURISDICTION

Sec.

* * * * *

§ 1346. United States as defendant

(a) * * *

* * * * *

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension, *except as provided for in subchapter II of chapter 71 of title 38.*

* * * * *

TITLE 38—UNITED STATES CODE

* * * * *

PART I—GENERAL PROVISIONS

* * * * *

CHAPTER 3—VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

SUBCHAPTER I—VETERANS' ADMINISTRATION

Sec.

- 201. Veterans' Administration an independent agency.
- 202. Seal of the Veterans' Administration.
- 203. Availability of appropriations.

SUBCHAPTER II—ADMINISTRATOR OF VETERANS' AFFAIRS

- 210. Appointment and general authority of Administrator; Deputy Administrator.
- 211. Decisions by Administrator; opinions of Attorney General.
- 212. Delegation of authority and assignment of duties.
- 213. Contracts and personal services.
- 214. Report to the Congress.
- 215. Publication of laws relating to veterans.
- 217. Studies of rehabilitation of disabled persons.

218. Standards of conduct and arrests for crimes at hospitals, domiciliaries, cemeteries, and other Veterans' Administration reservations.
 219. Evaluation and data collection.
 220. Coordination and promotion of other Federal programs affecting veterans and their dependents.
 221. Advisory Committee on Former Prisoners of War.
 222. Rule making.

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Subchapter II—Administrator of Veterans' Affairs

* * * * *

§ 211. Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in sections 775 [.] and 784 and subchapter II of chapter 71 of this title, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

* * * * *

§ 222. Rule making

Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator, other than rules or regulations pertaining to agency management or personnel or to public property or contracts, shall be subject to the requirements of section 553 of title 5.

* * * * *

PART IV—GENERAL ADMINISTRATIVE PROVISIONS

CHAPTER	Sec.
51. [Applications] Claims, Effective Dates, and Payments	3001
53. Special Provisions Relating to Benefits	3101
55. Minors, Incompetents, and Other Wards	3201
57. Records and Investigations	3301
59. Agents and Attorneys	3401
61. Penal and Forfeiture Provisions	3501

CHAPTER 51—[APPLICATIONS] CLAIMS, EFFECTIVE DATES, AND PAYMENTS

SUBCHAPTER I—[APPLICATIONS] CLAIMS

Sec.
3001. Claims and forms.
3002. Application forms furnished upon request.
3003. Incomplete applications.
3005. Joint applications for social security and dependency and indemnity compensation.
3006. Furnishing of information by other agencies.
3007. Burden of proof; benefit of the doubt.

3010. Effective dates of awards.

* * * * *

Subchapter I—[Applications] Claims

§ 3001. Claims and forms

(a) * * *

* * * * *

§ 3007. Burden of proof; benefit of the doubt

(a) *Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.*

(b) *When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.*

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Subchapter II—Effective Dates

§ 3010. Effective dates of awards

(a) * * *

* * * * *

(i)(1) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence resulting from the correction of the military records of the proper service department under section 1552 of title 10, or the change, correction, or modification of a discharge or dismissal under section 1553 of title 10, or from other corrective action by competent authority, the effective date of commencement of the benefits so awarded shall be the date on which an application was filed for correction of the military record or for the change, modification, or correction of a discharge or dismissal, as the case may be, or the date such disallowed claim was filed, whichever date is the later, but in no event shall such award of benefits be retroactive for more than one year from the date of reopening of such disallowed claim. This subsection shall not apply to any application or claim for Government life insurance benefits.

(2) *Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the proper service department, the effective date of commencement of the benefits so awarded shall be the date on*

which an award of benefits under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed.

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CHAPTER 57—RECORDS AND INVESTIGATIONS

* * * * *

Subchapter II—Investigations

§ 3311. Authority to issue subpoenas

For the purposes of the laws administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Veterans' Administration. Any person required by such subpoenas to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States. *Subpoenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing by registered or certified mail addressed to such individual at such individual's last known dwelling place or principal place of business. A verified return by the individual so serving the subpoena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.*

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CHAPTER 59—AGENTS AND ATTORNEYS

* * * * *

§ 3404. Recognition of agents and attorneys generally

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney—

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

[(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

[(1) shall be determined and paid as prescribed by the Administrator;

[(2) shall not exceed \$10 with respect to any one claim; and

[(3) shall be deducted from monetary benefits claimed and allowed.]

(c) *The Administrator shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation before the Veterans' Administration in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—*

(1) for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered, \$10; or

(2) for any claim resolved after such time, an amount in excess of—

(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claim; or

(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

(i) the fee agreed upon by the claimant and the attorney; or

(ii) \$500, or such greater amount as may be specified from time to time in regulations which the Administrator shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of \$500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

(d)(1) *If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on wheth-*

er or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 percent of the total amount of any past-due benefits awarded on the basis of the claim.

(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of \$750 to be paid to the attorney by the claimant for the representation of such claimant.

(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision of the Administrator or court making such award.

(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

(g) For the purposes of this section—

(1) the terms "final decision of the Administrator" and "claim for benefits" shall have the same meaning provided for such terms, respectively, in section 4025(a) of this title; and

(2) claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fee and costs in accordance with the provisions of section 2412(d) of title 28, notwithstanding the provisions of section 204(c) of the Equal Access to Justice Act, Public Law 96-481.

§ 3405. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in section 3404 or 784 of this title, [or] (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due [him] such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title, shall be fined not more than \$500, or imprisoned at hard labor for not more than two years, or both.

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PART V—BOARDS AND DEPARTMENTS

* * * * *

CHAPTER 71—BOARD OF VETERANS' APPEALS

SUBCHAPTER I—GENERAL

Sec.

- 4001. Composition of Board of Veterans' Appeals.
- 4002. Assignment of members of Board.
- 4003. Determinations by the Board.
- 4004. Jurisdiction of the Board.
- 4005. Filing of notice of disagreement and appeal.
- 4005A. Simultaneously contested claims.
- 4006. Administrative appeals.
- 4007. Docketing of appeals.
- 4008. Rejection of applications.
- 4009. Independent medical opinions.
- 4010. *Adjudication procedures.*
- 4011. *Notice of procedural rights.*

SUBCHAPTER II—JUDICIAL REVIEW

- 4025. *Right of review; commencement of action.*
- 4026. *Scope of review.*
- 4027. *Remands.*
- 4028. *Survival of actions.*
- 4029. *Appellate review.*

Subchapter I—General

§ 4001. Composition of Board of Veterans' Appeals

(a) There shall be in the Veterans' Administration a Board of Veterans' Appeals (hereinafter in this chapter referred to as the "Board") under the administrative control and supervision of a chairman directly responsible to the Administrator. The Board shall consist of a Chairman, a Vice Chairman, such number (not more than [fifty] sixty-five) of [associate] members as may be found necessary, and such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board *in a timely manner.*

(b) Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President.

(c)(1) *When there are 65 members of the Board, the Chairman may from time to time appoint from the professional staff of the Board, or reappoint one time within the three-year period following the expiration of the term of the initial appointment, individuals to serve as temporary members of the Board for terms not to exceed one year. Not more than one such member may be appointed to a section of the Board.*

(2) *If, as a result of the temporary absence of a member, a section is composed of less than three members, the Chairman may assign an individual from the professional staff of the Board to serve as an acting member of the Board on such section for not to exceed 30 days. An individual so appointed may serve a total of 60 days as an acting member during any fiscal year. Not more than one such member may be assigned to a section of the Board.*

(3) *In each annual report to the Congress required by section 214 of this title, the Administrator shall provide detailed descriptions of the activities undertaken and plans made in the fiscal year for*

which such report is made with respect to the authority provided by paragraph (1) of this subsection. In each such annual report, the Administrator shall indicate, in terms of full-time employee equivalents, the number of Board members appointed pursuant to paragraph (2) of this subsection.

(d) The Chairman shall submit a report to the appropriate committees of the Congress, not later than December 31, 1984, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the twenty-four months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members of, and the professional, administrative, clerical, stenographic, and other personnel employed by, the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section.

§ 4002. Assignment of members of Board

The Chairman may from time to time divide the Board into sections of three members, assign the members of the Board thereto, and designate the chief thereof. If a section as a result of a vacancy or absence or inability of a member assigned thereto to serve thereon is composed of a number of members less than designated for the section, the Chairman may assign other members to the section or direct the section to proceed with the transaction of business without awaiting any additional assignment of members thereto. A hearing docket shall be maintained and formal recorded hearings shall be held by such [associate] member or members as the Chairman may designate, the [associate] member or members being of the section which will make final determination in the claim. A section of the Board shall make a determination on any proceeding instituted before the Board and on any motion in connection therewith assigned to such section by the Chairman and shall make a report of any such determination, which report shall constitute its final disposition of the proceeding.

§ 4003. Determinations by the Board

(a) The determination of the section, when unanimously concurred in by the members of the section shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned, after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be

heard in connection with such information, reach a contrary conclusion.

(b) **[When]** (1) *Except as provided in paragraph (2), when there is a disagreement among members of the section the concurrence of the Chairman with the majority of members of such section shall constitute the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned, after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information, reach a contrary conclusion.*

(2) *When, without the vote of a member appointed under section 4001(c)(1) or (2) of this title a section would be evenly divided, such member shall not vote.*

§ 4004. Jurisdiction of the Board

(a) All questions on claims **[involving]** for benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board *after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law.*

[b] When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision. **]**

(b)(1) *Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.*

(2) *Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—*

(A) *when new and material evidence is secured, shall, and*

(B) *for good cause shown, may*

authorize the reopening of a claim and review of the Board's former decision.

(3) *A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authority set forth in paragraph (2) of this subsection to authorize the reopening of a claim and a review of the former decision.*

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

[d] The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated. **]**

(d) *After reaching a decision in a case, the Board shall promptly mail notice of its decision to the claimant and the claimant's au-*

thorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact and law and on matters of discretion presented on the record; and

(2) an order granting appropriate relief or denying relief.

§ 4005. Filing of notice of disagreement and appeal

((d) * * *

(5) The Board of Veterans' Appeals [will base its decision on the entire record and] may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

§ 4009. Independent medical opinions

(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in an appeal case, the Board is authorized to secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions at the request of the Chairman of the Board. Such arrangement will provide that the actual selection of the expert or experts to give the advisory opinion in any individual case will be made by an appropriate official of such institution.

(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and, after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, the provisions of subchapter II of chapter 71 of this title to the contrary notwithstanding.

§ 4010. Adjudication procedures

(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for bene-

fits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations which the Administrator shall prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

(A) to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations which the Administrator shall prescribe, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

(D) to submit rebuttal evidence;

(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this subsection fails to answer or fails to provide responsive answers to any such interrogatories within thirty days after service or such additional time as the Administrator may

allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpoena under section 3311 of this title (with enforcement of such subpoena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within one hundred miles of where such person resides, is employed, or transacts business.

(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

§ 4011. Notice of procedural rights

In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administra-

tion policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.

Subchapter II—Judicial Review

§ 4025. Right of review; commencement of action

(a) For the purposes of this chapter—

(1) "final decision of the Administrator" means—

(A) a final determination of the Board of Veterans' Appeals pursuant to section 4004 (a) or (b) of this title; or

(B) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title; and

(2) "claim for benefits" means—

(A) an initial claim filed under section 3001 of this title;

(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or

(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph.

(b) Except as provided in subsection (f) of this section, after any final decision of the Administrator adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after notice of such decision is mailed to such claimant pursuant to section 4004(d) of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

(c) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

(d) Not later than 30 days after filing the answer to a complaint filed pursuant to subsection (a) of this section, the Administrator shall file a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court considers relevant to its consideration of the case.

(e) In an action brought pursuant to subsection (b) of this section, the court shall have the power, upon the pleadings and the records

specified in subsection (d) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with such section or section 4027 of this title.

(f)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than 180 days after notice of the first final decision of the Administrator rendered after the last day of such fiscal year is mailed to the claimant pursuant to section 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within 180 days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Administrator.

(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title.

§ 4026. Scope of review

(a)(1) In any action brought under section 4025 of this title, the court to the extent necessary to its decision and when presented, shall—

(A) decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

(B) compel action of the Administrator unlawfully withheld;

(C) hold unlawful and set aside decisions, findings (other than those described in clause (D) of this paragraph), and conclusions of the Administrator found to be—

(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) contrary to constitutional right, power, privilege, or immunity;

(iii) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(iv) without observance of procedure required by law; and

(D) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside.

(2) Before setting aside any finding of fact under paragraph (1)(D) of this subsection, the court shall specify the deficiencies in the record upon which the court would set aside such finding and shall remand the case one time to the Administrator for further action not inconsistent with the order of the court in remanding the case. In remanding a case under the first sentence of this paragraph, the court shall specify a reasonable period of time within which the Administrator shall complete the ordered action. If the Administrator does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(d) of this title shall be subject to review, and the court shall review

those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the court.

(d) When a final decision of the Administrator is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

§ 4027. Remands

(a)(1) In any action brought under section 4025 of this title, the court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (b) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within ninety days after the date of such remand, the matter shall be returned to the court for its action.

(2)(A) At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator.

(B) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator.

(C) In the case of a remand under subparagraph (A) or (B) of this paragraph, the court may specify a reasonable period of time within which the Administrator shall complete the required action.

(b) After a case is remanded to the Administrator under subsection (a) of this section, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based. Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title.

§ 4028. Survival of actions

Any action brought under section 4025 of this title shall survive, notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

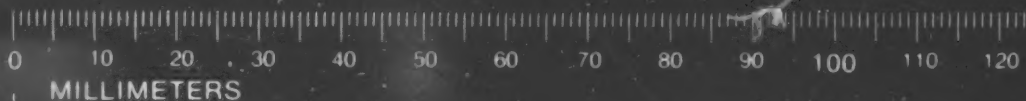
§ 4029. Appellate review

The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme

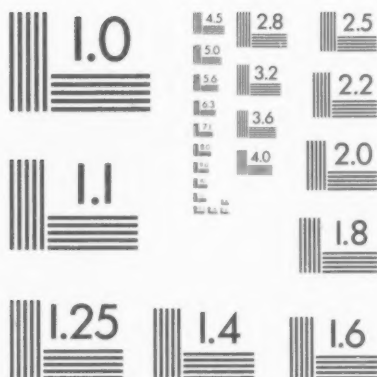
*Court of the United States in the same manner as judgments in
other civil actions.*

* * * * *





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